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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 170

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
PETITIONER,

vs.

WESTINGHOUSE, CHURCH, KERR & CO., INC.

No. 171

WALKER D. HINES, LATE DIRECTOR GENERAL OF
RAILROADS, PETITIONER,

vs.

WESTINGHOUSE, CHURCH, KERR & CO., INC.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF APPEALS
OF THE STATE OF VIRGINIA

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[fol. 1] **IN SUPREME COURT OF APPEALS OF VIRGINIA,
AT RICHMOND**

THE CHESAPEAKE & OHIO RAILWAY COMPANY

v.

WESTINGHOUSE, CHURCH, KERR & CO., INC.

PETITION FOR WRIT OF ERROR

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, The Chesapeake & Ohio Railway Company, a corporation, hereinafter called the Railway Company, respectfully represents that it is aggrieved by a final judgment of the Circuit Court of the City of Richmond, Virginia, entered on the 10th day of May, 1922, wherein a recovery was denied your petitioner and a judgment rendered for the defendant in a certain action of assumpsit brought by your petitioner against the Westinghouse, Church, Kerr & Co., Inc., a corporation, hereinafter called the Construction Company, for \$9,347.28 for "services of engines and crews at Newport News, Va.," during the months of October, November and December, 1917 (Rec., m. p. 4). While the above was the amount claimed in the account filed with the declaration, your petitioner sought to recover and asked judgment for only a part thereof, viz: the sum of \$7,533.50, as of December 31st, 1917 (Rec., m. p. 49, 184).

IN SUPREME COURT OF APPEALS OF VIRGINIA

STATEMENT OF THE CASE

Herewith presented is a transcript of the record from which it appears that the Construction Company came to Newport News, Virginia, "about the middle of 1917," having a contract with the United States Government for the erection of embarkation facilities at Newport News, Virginia, particularly two camps known as Camp Hill and Camp Stuart. The original contract involved a million dollars, an amount, however, which was subsequently increased (Rec., m. p. 77). The contract was what is known as a "cost plus" contract, that is to say, the Government paid the actual cost of the work and a commission to the contractor, upon a graduated scale inversely proportioned to the cost. They started out in "a very elaborate way, that is, they employed large numbers of men in a big hurry there." (Rec. m. p. 10.) Both of these camps were outside the right of way of the railroad. Camp Hill was located in a westerly direction paralleling the railroad, while Camp Stuart "was located in an easterly direction over on the river about three

miles * * *, or three mile and a half from Camp Hill." Immediately there were constructed to and from these camps and within them a great many railroad tracks. As to Camp Stuart, the Railway Company built a track from its right of way to the entrance of the Camp and the Government built the tracks within the Camp, while as to Camp Hill "that part of the tracks that was on the right of way of the Railway Company was built at the expense of the Railway Company, and for that part of the tracks off the right of way, or was in the Government reservation, the Railway Company billed the Government for the actual cost thereof and the bill was allowed." (Rec., m. p. 11, 137.)

Shortly after the work upon the construction of these camps had started, Alfred W. Bowie, who had charge of the work for the Construction Company, came to E. I. Ford, the then Superintendent of the Railway Company, located at Newport News, in charge of the Company's operations at that point, and told him, as testified to by Ford, that "the whole thing down there was going to be enlarged, going to be a great deal larger than expected, and that he would need an engine and crew to be at his command to do whatever work of shifting cars or handling cars as he would want them to handle and asked if I could arrange for him an engine and crew. I told him I thought we could do so, we had done it before for outside people and I would try to arrange it if he so desired." (Rec., m. p. 14.)

Thereupon, the following letters passed between the Construction Company and the Railway Company constituting the contract upon which this action was founded (Rec., m. p. 144, 145):

[fol. 3] EXHIBIT E. I. F. No. 1 TO STATEMENT

Westinghouse, Church, Kerr & Co., Inc., Engineers and Constructors

Newport News, Va., September 28, 1917.

Chesapeake & Ohio Railroad Co., Newport News, Va.

Attention Mr. Ford, Supt. of Terminal. 1892-6

GENTLEMEN: Referring to our conversation with you to-day, we believe the switching problem is getting so heavy on account of the work at the various sites that it would be advisable for you to assign us an engine and crew on your usual basis, billing us for the cost of operation as you may elect.

We would appreciate it if you would arrange for this engine and crew at the earliest possible moment, and also advise us if there is anything we can do towards helping out in furnishing a crew for this engine.

Yours very truly, Westinghouse, Church, Kerr & Company.
Alfred W. Bowie, Engineer in Charge.

AWB-JCC.

EXHIBIT E. I. F. No. 2 TO STATEMENT

Newport News, Va., September 29, 1917.

Westinghouse, Church, Kerr & Company, Newport News, Va.

GENTLEMEN: Your letter of the 28th inst. under file 1892-6, with respect to providing an engine and crew to take care of your business at the various camp sites.

Beg to state that this engine will be assigned to your work, commencing Monday night and you will be billed for the use of the engine and crew, together with the cost of supplies, repairs, etc., plus ten per cent.

Yours very truly, (Signed) E. I. Ford, Superintendent.

B.

It will be observed from the correspondence that it was stated the Construction Company would be "billed for the use of the engine and crew, together with cost of supplies, etc., plus ten per cent," which was in response to Construction Company's suggestion that the bills be rendered upon the Railway Company's "usual basis." The Railway Company had established and put into operation a set of charges for such service, covered by a circular denominated "Equipment Rentals," which set out the charges for this service in detail (m. p. 15, 146, et seq.). It was upon the basis of this particular circular that bills were rendered the Construction Company, with the exception that the circular provided for a supervision charge of 25%, whereas the Railway Company in its contract with the Construction Company made this charge only 10%. It is not disputed that these charges were fair and reasonable for the charter of service rendered. (M. p. 16 and 17.)

Following the correspondence above mentioned, an engine and crew were forthwith put at the disposal of the Construction Company, viz: on the Monday following September 27th, 1917, and as stated by Mr. Ford, the Construction Company thereupon "had full charge of the engine (it) was directed by them altogether, and no officer of the railroad, yard master or anyone had any jurisdiction over that engine whatever. It was the same as if it did not belong to us as far as the railroad using it was concerned." (Rec., m. p. 19.)

The class of service rendered by this engine and crew was stated by Mr. Ford to be as follows:

"The cars that went to Westinghouse, Church, Kerr people came in various freight trains, and those freight trains pulled in what was known as the receiving yard, and such cars as belonged to Westinghouse, Church, Kerr people were classified into the classification yards and were put in certain tracks in the yard * * *. This switch engine went to those tracks under the supervision of the Westinghouse, Church, Kerr people and not the C. & O. yard master, and took those cars out and carried them to the various places [fol. 5] of operation of the Westinghouse, Church, Kerr people. At the time it started in, camps were being built and likewise railroad

tracks, as fast as they could, to get to those places where they were building them, and this engine was used in various kinds of work of the Westinghouse, Church, Kerr people, different from what the railroad would be required to use it for."

Explaining this difference, the witness stated:

"If they wanted a car of brick or a car of cement or a car of lumber or ten cars of material, they would take this engine and stand with it and place it where they wanted it to keep the men working to the best advantage, and they would take these cars and carry them to another place where the material was needed; and it was extraordinary service that the railroad could not be required under any circumstances to render; and Mr. Bowie stated he would rather have an engine at his disposal."

The Construction Company took over and held this engine and crew and used them in the manner indicated, from the first day of October, 1917, or thereabouts, to and through the month of March, 1918.

In the meantime it should be observed that on midnight, December 31, 1917, the Federal Government took over the Transportation Systems of the country, including that of your petitioner, under the Act of Congress known as the Federal Control Act, and the same was thereafter under the direction, supervision and control of the Director General of Railroads during the period from the 1st of January to the 1st of April, 1918. The contract involved herein, upon the assumption of Federal Control, thereupon enured to the benefit of the Director General of Railroads. A separate action was instituted and heard along with this action in the Circuit Court, for the amount due the Director General of Railroads, amounting, after allowing certain credits, to \$5,765.43, as of April 1st, 1918, and met a similar fate. A petition for a writ of error in that case will be presented along with this. The cases were, by agreement, heard together by the Court, without a jury. The Court, after hearing the evidence and arguments of Counsel rendered a judgment for the defendant in both cases, which judgments it subsequently refused to set aside.

[fol. 6] IN SUPREME COURT OF APPEALS OF VIRGINIA

ASSIGNMENTS OF ERROR

It is respectfully submitted that in the progress of the trial of this action, the learned Judge of the Circuit Court erred in the following particulars:

- (1) In entering up judgment for the defendant;
- (2) In refusing to enter up judgment for the plaintiff;

(3) In admitting, over the objection of the plaintiff, certain statements of A. W. Bowie, a witness for the defendant, upon his cross-examination. (See Bill of Exceptions No. 2, m. p. 185); and

(4) In refusing to set aside the judgment and award the plaintiff a new trial.

Argument

The first two assignments of error involve the merits of the case as presented. Of course, it is at once apparent that the only question that can be involved here is the validity of the contract. That the contract was entered into and the contemplated service was rendered thereunder was not disputed.

The argument advanced by counsel for the Construction Company, and which the court seems to have followed, was two-fold:

(1) That the contract was without a legal consideration in that it was a contract on the part of the Railway Company to do that which it was already under a legal obligation to do; and

(2) That the contract constituted an illegal preference under the Interstate Commerce Act.

I

Contract Not Without Consideration

The theory of the Construction Company's counsel on this branch of the case seems to have been that the service rendered by the engine and crew was a service covered by and included within the line haul rate.

Reliance is made upon a general tariff provision that the freight [fol. 7] rates "apply from and to the tracks, stations or other receiving and delivering points on or to and from private sidings connected with lines," parties to the tariff, "where the particular traffic is usually received or delivered, and also include the use of receiving and delivering facilities of such stations or other receiving and delivery points or private sidings, subject, nevertheless to such charges (if any) for switching terminal service, storage, icing, demurrage, and all other charges * * *. The rates will also apply to and from such tracks, stations, or other receiving and delivery points, on or to and from private sidings connected with connecting lines not parties to this tariff, &c." (Rec., m. p. 141.) The ultimate contention seems to be that the service rendered by this engine and crew was covered by and paid for in the freight rates of the articles transported, thus rendering the contract without consideration and void.

1. This view, even if otherwise maintainable, is refuted absolutely by the witness Ford, an expert on the subject, and apparently the only witness in the case who testified as an expert on this specific

point. After showing his knowledge of and familiarity with railroad tariffs, the witness was asked the following question:

"Is the service, which you have described, that was rendered by this engine and crew, such service as is embraced within the tariffs at Newport News—tariffs affecting the delivery of stuff at Newport News?"

To which the witness answered:

"The bulk of the service that they used this switch engine for was not contemplated by any tariff that I have ever read. It was unusual, unprecedented service; there was no precedent to go by. We have never had any such service asked for and it was unusual, outside of the tariff provisions, the same as unloading a circus or any other work outside of the legitimate placing of cars in the yard; it was a war measure; we never had any such service asked for before." (Rec., m. p. 30, 31.)

While some of the witnesses for the defendant expressed the opinion that the service rendered by the engine and crew was such as the Railway Company should have rendered them otherwise (Rec., m. p. 69, 118, 128), none of them pretended to be experts on the subject and furthermore they all apparently admitted that the use [fol. 8] of the engine and crew enabled them to get service, which, under the conditions existing they could not have otherwise gotten. (Rec., m. p. 172, 95, 113, 123, 130.) This itself constituted a sufficient consideration to support the contract, assuming the contract was otherwise valid, since it was certainly a "benefit to the party promised."

Furthermore, the rental of the engine was certainly a loss, inconvenience, and deprivation to the party promising, constituting a sufficient consideration to support a contract.

2. Advantages accrued to the Construction Company from the use of this engine and crew, other than those named. As stated by the witness Ford:

"It was all kinds of an advantage to them. It enabled them to keep material up to the men. That is one advantage—keep it near where the men were working, and it enabled them to place the cars, one car at three or four different places, if necessary, and it saved them the switching charges in switching a car every time it was moved, which the railroad would have had a right to have done. * * * Saved them demurrage and saved time and enabled them to build the camps quicker, and it was helpful to them in all kinds of ways." (Rec., m. p. 25.) Such services were not, by any possibility within the freight rate. See Merchants Shipbuilding Corp., Agent, et als., v. P. R. R. Co., et als., 61 I. C. C. 214; cited *infra*; 4 Ruling Case Law, p. 554.

We think this sufficiently disposes of the question of the alleged lack of consideration for the contract.

3. The mere fact that the engine and crew may have incidentally performed services that the Railway Company would have been otherwise under a legal duty to perform did not render the contract invalid because of lack of consideration or otherwise.

It is admitted that a shipper can insist upon a carrier rendering every service included within the rate.

U. S. Cast Iron Pipe & Foundry Co. v. Director General, 57 I. C. C. 677-681.

And the Construction Company could have insisted, had it so desired, that all cars consigned to it be spotted once at either Camp Hill or Stuart, and the carrier would have been under tariff obligations to have this spotting service.

U. S. Cast I. P. & F. Co. v. Director General, *supra*. See also the provisions of the tariff hereinbefore quoted.

[fol. 9] But a carrier has a right to insist upon performance of any transportation service which the law imposes upon it to furnish.

A. T. & S. F. v. U. S., 232 U. S., 199;

Arlington Heights Fruit Ex., et als., v. S. P. Co., et als., 20 I. C. C. 106;

Buckeye Steel Casting Co. v. H. V. and Director General, 58 I. C. C. 500;

1 Roberts Federal Liabilities of Carriers, Sec. 132;

Edge Moor Iron Co. v. D. G., as Agent, 61 I. C. C. 537, 39.

In the case of *A. T. & S. F. v. U. S.*, *supra*, the court said:

"This rule is attacked by the appellants, who contend that icing is a part of refrigeration, which the Hepburn Act makes a part of the transportation they are bound to furnish upon reasonable request. They insist that in order to meet the duty, thus imposed by statute, they have been compelled at great expense to erect immense plants where trainloads of fruit can be cooled and where an enormous quantity of ice is manufactured for refrigeration purposes. They argue that, being bound to furnish all necessary icing and re-icing, and having at great cost prepared to furnish the supply, it is not only just but a right given by statute, that they should be allowed to provide all needed icing or refrigeration at a rate to be approved by the Commission. Whatever transportation service or facility the law requires the carrier to supply they have a right to furnish. They can, therefore, use their own cars, and cannot be compelled to accept those tendered by the shipper on condition that a lower freight be charged. So, too, they can furnish all the ice needed in refrigeration, for this is not only a duty and a right, under the Hepburn Act, but an economic necessity due to the fact that the carriers cannot be expected to prepare to meet the demand, and then let the use of their plants depend upon haphazard calls, under which re-

refrigeration can be demanded by all shippers at one time and by only a few at another. This contention was sustained by the Commission, which recognized that the shipper has no right to provide refrigeration himself today and call upon the railroad company for that service tomorrow. To permit such a course is to demoralize the service of the defendants and prevent them from discharging their duty with economy and efficiency * * * It is the duty of the carrier to furnish refrigeration upon reasonable demand, and in so far as the furnishing of that refrigeration is a part of the service rendered by the carrier, the carrier may insist upon its right to [fol. 10] furnish that service exclusively. 20 I. C. C. 116."

In the case of *U. S. Cast Iron Pipe & Foundry Co. v. D. G.*, supra, Mr. Commissioner Wooley, speaking for Division 2 of the Interstate Commerce Commission, said:

"To render with its own equipment *all the transportation service*, which it is obliged to perform, if so desired, is the defendant's unquestionable right." (Italics supplied.)

In the case of *P. F. I. Co. v. D. G.*, 59 I. C. C. 29-32, Mr. Commissioner Daniel said:

"It is well established that whatever service a carrier can be required to perform, it may insist upon performing." (Italics supplied.)

Sect. 15, cl. 13 of the Interstate Commerce Act, as amended, contemplates the rendition of a service such as the furnishing of an instrumentality by the "Owner of the property transported," but the carrier is under no legal obligation to compensate. This follows as a *colollary* from the legal right of a carrier to render any service which the law imposes upon it to render.

A carrier has the right to make an allowance if it so desires, the only prohibition being against making allowance in one case and refusing it under substantially similar conditions, but it cannot be compelled to make allowance.

Edge Moor Iron Co. v. D. G., as Agt. &c., supra.

It is obvious that in all cases where it is more convenient for the spotting service to be performed by the "owner of the property transported" no allowance would be made; whereas, when it is to the advantage of the carrier that such service be performed by the owner, allowance might be made.

In the case of *Sharon Steel Co. v. Pa. Steel Co. D. G.*, as Agent, 59 I. C. C. 378, Mr. Commissioner Wooley, speaking for the Commission, said:

"A common carrier cannot be compelled to delegate to a shipper the performance of any part of the service or transportation required of it under the law and its tariffs to make an allowance under Section 15 of the Interstate Commerce Act for such performance; it

[fol. 11] has the right, if it so elects, to perform the full transportation service itself."

Such allowances, if made, must be published in the tariffs. In the case of *Waste Merchants Asso. v. D. G.*, 59 I. C. C. 686, at 689, Mr. Commissioner Wooley, again speaking, said:

"There is no alternative clause in defendants' tariffs providing for the payment of an allowance if the shipper perform the loading service, and hence since all allowances to a shipper must be published in the tariffs, even if defendants desired, they could not lawfully have compensated complainants' members for the loading service rendered by them. Nothing in the act requires that a shipper must be reimbursed for transportation service that he may elect to perform primarily for his own convenience.

Section 15 says:

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than just and reasonable, and the Commissioner may, after hearing on a complaint or on *own its* initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished."

This provision is intended merely to provide against excessive allowances."

In the case of *Pittsburgh Forge & Iron Co. v. D. G.* 59 I. C. C., p. 29, Mr. Daniels, Commissioner, speaking for Division 2, at page 32, remarked:

"Nor are shippers entitled to an allowance from the carrier for what the carrier is ready and willing to perform, and which the shipper performs because it is not convenient to permit the carrier to perform the service."

See also *Downry Shipbuilding Corporation v. S. I. R. T. Co.*, et al., 60 I. C. C. 543.

In the case of *Merchants Shipbuilding Corp.*, Agent, et als., v. *P. R. R. Co.* and *D. G.*, as Agent, 61 I. C. C. 214, wherein the complainant was seeking reparation upon the ground that:

[fol. 12] "It has performed the interchange switching and spotting service in connection with interstate traffic to and from its plant at Harriman; that defendants have made no allowance to complainant therefor; that Harriman (plant) is within the Philadelphia district; that for industries similarly situated in this district defendants either perform the switching and spotting services or make allowances therefor to the industries; and that by reason of the facts alleged, it has paid charges for transportation which were and are unreasonable, unjustly discriminatory, and are unduly

prejudicial, in violation of sections 1, 2 and 3 of the interstate commerce act and of section 10 of the Federal Control Act."

Mr. Chairman Clark said:

"No legal obligation, however, rests upon the carrier to perform switching and spotting service solely at a shipper's convenience, and this, in substance, is what complainant, desires. Further, it is well settled that a shipper is not entitled to an allowance from the carrier for a service which the carrier is ready and willing to perform and which the shipper performs because it is not convenient for it to permit the carrier to perform."

Citing Car Spotting Charges, 34 I. C. C. 609, 617.

(It is interesting to note that a portion of the switching performed by Complainants in that case was performed with engines leased from defendant.)

Therefore, had the engine here been the property of the Construction Company, there is no question but that the carrier could have collected on all shipments moving to Camp Hill and Stuart the full Newport News rate, and the defendant in error could not have insisted upon an allowance for the performance of the service such as the record indicates was performed by the leased engine.

There is no distinction in principle between performance of such service by a shipper with an owned and with a leased locomotive, since the lessee of the equipment is the owner, in legal intent, *pro hac vice*.

From what has been said, it seems clear that while the engine and crew in this case may have performed some services that otherwise would have been performed by the Railway Company, there could [fol. 13] have been no consideration moving from the Railway Company to the Construction Company therefor in the absence of a tariff provision making such allowance on the part of the Railway Company. The Construction Company then was conferring no benefit on the Railway Company, in the legal sense, by this service. The lease of the equipment, therefore, for the purposes indicated, was not a contract to do that which the Railway Company was obligated, in the legal sense, to do, since the Railway Company was in no way obligated to the shipper on account of such service, as to which proposition the authorities cited above are conclusive.

II

Contract Not Illegal under the Interstate Commerce Act

The final contention of the Construction Company is that the contract in question is a contract for a preferential service, and is, therefore, illegal and void under the Interstate Commerce Act, upon familiar principles. (*C. & O. v. Ruckman*, 115 Va. 493; *C. & A. v. Kirby*, 225 U. S. 155.)

1. It is to be observed here that the contract is for the lease or rental of equipment for a stipulated compensation. Such contracts are entirely within the power of carrier to make, unless their efficiency to the public is thereby impaired—(*Clough v. Grand Trunk R. Co.*, 155 Fed. 81; *U. P. R. Co. v. Chicago &c. Co.*, 163 U. S. 564)—of which there is no suggestion in the record.

The inhibition as to contracts for preferential service, under the Interstate Commerce Act, only applies to contracts made by carriers in their common-carrier relationship. 10 *Corpus Juris*, p. 479. As said by Mr. Justice Lurton in the case of *Clough v. Grand Trunk R. Co.*, *supra*:

“If the Railway Company was under no statutory or common law obligation to render the special service it was called upon to render there were no reasons of public policy which forbade the rendition of such service upon such terms as the parties might stipulate.”

In *Santa Fe P. & R. Co. v. Grant Bros. Cons. Co.*, 228 U. S. 177, 185, Mr. Justice Hughes, speaking for the court, said, referring to the rule that a carrier cannot stipulate against the consequences of negligence:

[fol. 14] “Manifestly this rule has no application when a railroad company is acting outside the performance of its duty as a common carrier. In such case it is dealing with matters involving ordinary considerations of contractual relation: those who choose to enter into engagement with it are not at a disadvantage; and its stipulations even against liability for its own neglect are not repugnant to the requirements of its public service. The rule extends no further than the reason for it. It is apparent that there may be special engagements which are not embraced in its duty as a common carrier, although their performance may incidentally involve actual transportation of persons and things, whose carriage in other circumstances might be within its public obligation.”

In the case of *Yazoo & M. V. R. Co. v. Crawford*, 107 Miss. 355, the court said of a contract with a company for loading logs on its cars under certain conditions therein referred to:

“We are of opinion that the contract made with the Valley Log Loading Company under the circumstances was not an illegal contract. The arrangement which the Railroad Company had made with reference to the loading of logs and furnishing to parties its cars, engines and crews was not in any sense a function or duty of the company in its capacity as a common carrier. There was no legal obligation resting upon the railroad company to furnish its cars, engines and crews to individuals carrying on a log loading business, or to receive logs to be loaded on its cars along the right of way between stations. The railroad company itself could have undertaken this to the exclusion of everybody else. This it not controverted. It would then monopolize the business in a sense, but not illegally.”

In *Sager v. Northern Pacific Ry. Co.*, 166 Fed. 526, it was held that a special contract between a carrier and a circus company to furnish motive power, etc., to move a circus train over the carrier's road at reduced rates, was not void as rendering special service.

Said the Court:

"Counsel for the plaintiff have also suggested that the contract here in question is illegal and void, as being within the express prohibition of section 4333 and 4334 of the North Dakota Revised Codes of 1905. These sections of the laws of that State were designed to [fol. 15] prevent common carriers undue or unreasonable preferences to persons or localities with respect to any particular description or traffic. They were not designed or intended to apply to that particular class of transportation which was the subject matter of the contract between the Northern Pacific Railway Company and the Gollmar Bros. Circus Company. These sections of the North Dakota Revised Codes should, in my opinion, be construed as referring simply to such transportation services as the railroads of that State were or are required to perform for the general public in the discharge of their duties to the public as common carriers, and should not be held to embrace services which the common carriers of that State, as well as of other States of the Union have never been obligated to perform, but which they have rendered to the public from time to time under special contracts."

"My conclusion therefore, is that the Northern Pacific Railway Company was under no common-law or statutory obligation to move the train of the circus company over any of its lines of road in the manner in which the train was being moved at the time the plaintiff was injured, and that the railway company was under no obligation, common-law or statutory duty, which operated to prevent it from making the contract here in controversy. * * *

See also—

Chicago, R. I. & P. Co. v. Maucher, 248 U. S. 359;
Robertson v. Old Colony R. Co., 156 Mass. 525;
Clough v. Grand Trunk R. Co., *supra*;
Coup v. Wabash &c. R. Co., 56 Mich. 111;
Forepaugh v. Del. &c. R. Co., 128 Pa. 217;
Chicago &c. R. Co. v. Wallace, 14 C. C. A. 257;
Wilson v. Atlantic &c. R. Co., 129 Fed. 774.

These cases seem conclusive of the validity of the contract in this case.

There is no provision in the interstate commerce act which prohibits the leasing or renting by common carriers of so much of their equipment as is not needed in the conduct of their business as common carriers, nor is there any reason why there should be. The Act of Congress does not deal with the subject. Sections 1 and 6 embrace only within their purview the transportation for compensation of persons and property. Leases of equipment under circumstances such as involved here, are questions with which the public are not concerned, so long as the carrier's efficiency as a public agency is not impaired.

[fol. 16] 2. Under the contract between the Construction Company and the Federal Government, the contractors were merely agents for the Government (Rec., m. p. 78) who had to pass upon and pay the bills of the contractor, and the shipments made to the construction company were in reality shipments made for the Government, in time of war (Rec., m. p. 117.) In the preamble to the contract between the Government and the Construction Company, it was recited, among other things, that:

"The Congress having declared by Joint Resolution, approved April 6, 1917, that war exists between the United States of America and Germany, a national emergency exists and *the United States urgently requires the immediate performance of the work herein-after described, and it is necessary that said work shall be completed within the shortest possible time.*" (Rec., m. p. 163; italics supplied.)

In view of these considerations it was agreed between the Government and the Construction Company that the work should be done "in the shortest possible time" and that it would begin the work specified "at the earliest time practicable and diligently proceed so that such work be completed at the earliest possible date." (Rec., m. p. 163, 172.)

Furthermore, an amendment to the Interstate Commerce Act, adopted Aug. 29, 1916 (34 St. at L. 584), provided:

"That in time of war or threatened war, preference and precedence shall, upon the demand of the President, be given over all other traffic for the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic."

Besides all this, it is apparent that Sec. 3, paragraph (1) of the Interstate Commerce Act, forbidding carriers from giving "any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, &c.,"—the section under which it is urged the contract between the Railway Company and the Construction Company was illegal—does not refer to a preference given the Government itself. A sovereign is not ordinarily amenable to laws made for its subjects. In order for such to be the case there must be clear and unequivocal language by the law—making power to that effect.

[fol. 17] (3) Even if such leases of equipment as that involved here were within the purview of the Interstate Commerce Act (which as we have seen is not the case) then instead of the exacting of compensation for the use of the equipment constituting a preference, the failure to do so would seem to bring about that result, since the Construction Company would thereby be receiving a more advantageous service than other shippers under like circumstances. See the Ruckman and Kirby cases, cited *supra*. See also Section 3, paragraph (1) of Interstate Commerce Act, *supra*.

III

Exceptions to Testimony

During the cross-examination of A. W. Bowie, a witness for the Construction Company, he stated, in an answer not responsive to questions asked, that at the time the written contract was entered into he was given to understand by E. I. Ford, the representative of the Railway Company, who conducted the negotiations and signed the letter constituting the contract, that there was to be no charge made for the rental of the engine and use of the crew. (Rec., m. p. 185, 186.) This evidence was directly contradictory of both the letter of the Construction Company, signed by Bowie, and the letter of the Railway Company, signed by Ford; was in contradiction of the witness' own action in recommending the payment of the bills to the Government—which he testified he did (Rec., m. p. 186); and furthermore no authority was shown in the witness Ford to make any agreement altering the "Equipment Rental" circular issued by the General Manager of the Railway Company. Upon plain principles this evidence was clearly inadmissible. See *Whitaker v. Lane*, 128 Va., 317-346.

Your petitioner therefore prays for a writ of error and that the judgment complained of may be reviewed and reversed, and that judgment be entered up for petitioner, in this court, for the amount claimed by it, with interest.

Respectfully submitted, The Chesapeake & Ohio Railway Company, by D. H. & Walter Leake, Sherlock Bronson, of Counsel. D. H. & Walter Leake, Sherlock Bronson, Meade T. Spicer, Jr., f. p.

[fol. 18] We, counsel practicing in the Supreme Court of Appeals of Virginia, are respectfully of the opinion that there is error in the accompanying record and that judgment complained of should be reviewed and reversed.

D. H. Leake, Sherlock Bronson.

Rec'd Oct. 7, 1922.

Writ of error allowed. Bond \$250.

Robt. R. Prentiss.

[Caption omitted]

IN CIRCUIT COURT OF CITY OF RICHMOND

THE CHESAPEAKE & OHIO RAILWAY Co., a Corporation, Plaintiff,

vs.

WESTINGHOUSE, CHURCH, KERR & COMPANY, INC., a Corporation,
Defendant

DECLARATION

The Chesapeake and Ohio Railway Company, a corporation, chartered under the laws of the State of Virginia, complains of the Westinghouse, Church, Kerr & Company, Incorporated, a corporation, chartered under the laws of the State of Virginia, defendant, of a [fol. 19] plea of trespass on the case in assumpsit, for this, to-wit:

That heretofore, to-wit, on the 1st day of January, 1919, the said defendant was indebted to the said plaintiff in the sum of \$9,347.28 for the price and value of goods before that time sold and delivered by the plaintiff to the defendant at his special instance and request;

And also in the sum of \$9,347.28, for the price and value of work before that time done by the plaintiff for the defendant at his special instance and request;

And also in the sum of \$9,347.28, for money before that time lent by the plaintiff to the defendant at his special instance and request;

And also in the sum of \$9,347.28, for money before that time paid by the plaintiff for the use of the defendant at his special instance and request;

And also in the sum of \$9,347.28 for money before that time had and received by the defendant to the use of the said plaintiff.

And being so indebted, the said defendant, in consideration thereof, afterwards, to-wit, on the day, month and year aforesaid, undertook and faithfully promised the said plaintiff to pay it, the said several sums of money in the above count mentioned, when the said defendant should be thereunto afterwards requested.

And for this also, that heretofore, to-wit: on the day, month and year last aforesaid, the said defendant accounted with the said plaintiff of and concerning divers other sums of money before that time due and owing to the said plaintiff and then in arrears and unpaid and upon such accounting, the said defendant was found in arrear and indebted to the said plaintiff in the further sum of \$9,347.28 and being so found in arrear and indebted, he, the said defendant, in consideration thereof, undertook and then faithfully promised the said plaintiff to pay to it the said sum of money in this count last mentioned, when he, the said defendant, should be thereunto afterwards requested.

Yet the said defendant, not regarding his said several promises and undertaking hath not as yet paid to the said plaintiff the said several sums of money or any or either of them, or any part thereof, although often requested so to do; but to pay the same hath hitherto

wholly neglected and refused *ands* still doth neglect and refuse, to the damage of the plaintiff \$9,400.

[fol. 20] And therefore it institutes this action of trespass on the case in assumpsit.

D. H. & Walter Leake, Sherlock Bronson, p. q.

Account

VIRGINIA:

IN CIRCUIT COURT OF CITY OF RICHMOND

THE CHESAPEAKE & OHIO RAILWAY COMPANY

vs.

WESTINGHOUSE, CHURCH, KERR & COMPANY, INCORPORATED

Richmond, Virginia, May 28, 1919.

Messrs. Westinghouse, Church, Kerr & Co., Inc., P. O. Box 848,
Newport News, Va., to the Chesapeake and Ohio Railway, Dr.

For services of engines and crews at Newport News, Va., as follows:

October, 1917—Bill #437,364.....	\$3,509.83
November, “ “ 437,366.....	3,766.31
December, “ “ 437,368.....	2,071.14
	<hr/>
	\$9,347.28

Affidavit

STATE OF VIRGINIA,

City of Richmond, To wit:

Personally appeared before me, Jos. E. Powers, a Notary Public in and for the city aforesaid, in the State of Virginia, on this 10th day of July, 1919, in my said City, E. M. Thomas, who made oath that he is the General Auditor and Agent of the Chesapeake and Ohio Railway, the plaintiff in this action; that to the best of affiant's belief the amount of plaintiff's claim is \$9,347.28; that said amount is justly due; and that the plaintiff claims interest on \$3,509.83, part thereof from Nov. 1, 1917; on \$3,766.31 part thereof, from Dec. 1, 1917, and on \$2,071.14, residue thereof, from Jan. 1, 1918.
[fol. 21] Given under my hand this 10th day of July, 1919.

My commission expires January 12, 1921.

Jos. E. Powers, Notary Public.

Counter Affidavit

VIRGINIA:

IN CIRCUIT COURT OF CITY OF RICHMOND

CHESAPEAKE & OHIO RAILWAY COMPANY

vs.

WESTINGHOUSE, CHURCH, KERR & COMPANY, INCORPORATED

Affidavit

STATE OF NEW YORK,

County of New York, To wit:

This day, in the County of New York, State of New York, Arthur K. Wood, personally appeared before me, Louis H. Reuter, a Notary Public, of and for the County aforesaid, in the State of New York, and made oath that he is an agent for the defendant in this action; and that the plaintiff is not entitled, as the affiant verily believes, to recover anything from the defendant on such claim.

A. K. Wood.

Subscribed and sworn to before me this 28th day of July, 1919. In testimony whereof, I have hereunto set my hand and seal, the day, month and year aforesaid. Louis H. Reuter, Notary Public. Notary Public, New York County. N. Y. Co. Clerk's No. 228. N. Y. Co. register's No. 10,206. My commission expires on the 30th day of March, 1920.

[fol. 22] IN CIRCUIT COURT OF CITY OF RICHMOND

[Title omitted]

PLEA OF NON-ASSUMPSIT

The said defendant, by its attorney, comes and says that it did not undertake or promise in manner and form as the plaintiff hath in this action complained. And of this the said defendant puts himself upon the country.

Westinghouse, Church, Kerr & Co., Inc., by Munford, Hunton, Williams & Anderson, Counsel.

IN CIRCUIT COURT OF CITY OF RICHMOND

JUDGMENT—May 10, 1922

This day came again the parties, by their attorneys, and neither party demanding a jury for the trial of this case, but agreeing that

the whole matters of law and fact may be heard and determined and judgment rendered by the Court and the evidence and arguments of counsel being heard.

It is therefore considered by the Court that the plaintiff take nothing by its bill and that the defendant go thereof without day and recover against the plaintiff its costs by it about its defense in this behalf expended. The plaintiff, by its attorneys, moved the Court to set aside said judgment and grant it a new trial, which motion the Court overruled. To which action and ruling of the Court the plaintiff, by its attorneys, excepted, and leave is given it to file its bill of exception.

MEMORANDUM.—Upon the trial of this case the plaintiff, by its attorneys, excepted to sundry opinions and judgment of the Court given against it and leave is given it to file its bill of exceptions at any time within the time prescribed by law.

[fol. 23] And afterwards, to-wit: At a Circuit Court of the City of Richmond held in the Court room of said City in the City Hall thereof on Saturday the 8th day of July, 1922.

This day came again the plaintiff, by its attorneys, and by virtue of the leave heretofore given it, this day filed its two bills of Exceptions herein and also filed a paper marked "Stipulations as to Record on Appeal," which said bills of exceptions and stipulations are ordered to be made a part of the record of the said trial.

IN CIRCUIT COURT OF CITY OF RICHMOND

Bill of Exceptions No. 1

[Title omitted]

CAPTION

Be it Remembered, That upon the trial of this cause, neither party demanding a jury, a jury was waived, and the whole matter of law and fact was submitted to the court for its decision and determination.

And, thereupon, upon the trial of said cause, the following evidence was adduced on behalf of the plaintiff and of the defendant, being all the evidence that was introduced in this cause.

E. I. FORD, a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Examination-in-chief.

By Mr. D. H. Leake:

Q. Your name is E. I. Ford?

A. Yes, sir.

Q. What is your business now, Mr. Ford, and where do you live?

A. I am Vice-President of the Consolidated Pocahontas Coal Co.

Q. Where do you live now?

A. Newport News.

[fol. 24] Q. Are you connected with the Chesapeake & Ohio Railway Co. now?

A. No, sir.

Q. Were you connected with them in the fall of 1917, and, if so, in what capacity?

A. I was in charge of all the activities of the railway at Newport News and Norfolk and Fortress Monroe in 1917.

Q. And what was your title then?

A. Superintendent.

Q. Superintendent of Terminals?

A. Superintendent of Chesapeake & Ohio Terminals.

Q. Did you subsequently receive any other title?

A. Later on I was made General Superintendent.

Q. Did you know the concern, Westinghouse, Church, Kerr & Co., Inc., and, if so, what activities were they engaged in at that time?

A. Yes. I knew the local officers of the company and those that were in charge of the activity of building camps at Newport News.

Q. What camps were they concerned with?

A. Those people came to Newport News in about the middle of 1917 and called on me and said that they had contracts to do a great deal of work in the way of building camps and everything that went with the camps in the way of building and started in there in a very elaborate way, that is, they employed large numbers of men in a big hurry there. They got a tremendous force of men and started in building camps, both what was known afterwards as Camp Hill and Camp Stuart.

Q. What was the location of those camps in reference to the Chesapeake & Ohio Railway Company's terminals at Newport News?

A. They were outside of the right of way of the railroad. Camp Hill was located in a westerly direction.

Q. How far?

A. Paralleling the right of way for about a mile. Camp Stuart was located in an easterly direction over on the river, about three miles, I should say, or three miles and a half from Camp Hill. The two camps were separate.

Q. What was the connection between those camps and the railway company? What sort of connection was it between the railway company and the camps?

Witness: You mean rail connection?

Mr. D. H. Leake: Yes, sir.

[fol. 25] A. Wasn't any to start with.

Q. Was there eventually one?

A. Yes, sir. The Westinghouse Co. built, themselves, a great deal of tracks and the railway company built some tracks. The railway company built a track from its right of way to the entrance of the government reservation in Camp Stuart, to what is known on the map as Ivey Avenue, and then the government built the tracks within the enclosure of Camp Stuart. Camp Hill was undertaken in a different way.

By the Court:

Q. Did the company build from Ivey Avenue to the camp?

A. The company built from the railway right of way to Ivey Avenue.

By Mr. D. H. Leake:

Q. How far was Ivey Avenue from the camp?

A. Right at the entrance, right across the street.

By the Court:

Q. That is the entrance to Camp Stuart?

A. Yes, sir, and the railway company furnished a great deal of material that went into the building of those tracks within the enclosure, but they didn't do but very little, if any—I believe they did make a start to help them to build those tracks in there while they were organizing. Afterwards it was taken over by the Westinghouse, Church, Kerr people and completed.

By Mr. D. H. Leake:

Q. Did the railway company build those tracks for itself or for the government or for the contractors?

A. The railroad build the tracks to Ivey Avenue at its own cost. Such work as the railroad company did and such material as was furnished by the railway company on the tracks within the enclosure the government was billed for it and paid for it.

Q. In the enclosure?

A. Yes, sir, in the enclosure.

Q. Was there any contract covering that building of that track?

A. No contract.

By the Court:

Q. Was there any charge made for it against the defendant, Westinghouse, Church, Kerr & Co.?

[fol. 26] A. Yes, sir. We billed the Westinghouse, Church, Kerr Co. for some material that we let them have.

Q. I am talking about this track?

A. While they were waiting to get their own material.

Q. I am talking about this track.

Witness: To Ivey Avenue?

The Court: Yes.

A. No charge made for that.

The Court: You are not suing for that?

Mr. D. H. Leake: No, sir.

By Mr. D. H. Leake:

Q. That is in reference to Camp Stuart?

A. Camp Stuart.

Q. Now, you say, Camp Hill was different?

A. Camp Hill—All of us built tracks. The railroad company built all that they could build with the force and material that they had, both night and day. Their work was supplemented by the Westinghouse, Church, Kerr Co.; in other words, they took over the building of some, and the railroad built some, and that part of the railroad tracks that was on the right of way of the railway company was built at the expense of the railway, and that part of the tracks off the right of way, or was in the government reservation, the railway billed the government for the actual cost thereof, and the bill was allowed.

Q. I hand you herewith a letter of the Westinghouse, Church, Kerr & Co., being signed by Alfred W. Bowie, Engineer in charge, directed to the Chesapeake & Ohio Railway Co., Newport News, Va., attention Mr. Ford, and ask you if you received that letter, and, if so, under what circumstances? The letter is dated Sep. 28/17.

A. I recognize this letter and I received it. It is a letter of Mr. Bowie, who had full charge of the Westinghouse, Church, Kerr & Company's affairs as far as operation was concerned. He was a man that I looked to for instructions and did all the work, and I handled all the business with the Westinghouse, Church, Kerr & Co. through Mr. Bowie. I didn't know any other officer except him.

Q. I asked you under what circumstances that letter was received?

NOTE.—Letter here read and filed as "Exhibit E. I. F. #1."
(See Ex. at the end of testimony. See page 144 of this manuscript.)

[fol. 27] A. Acting upon that letter and acting upon that conversation—I remember that Mr. Bowie came to the office and told me that the whole thing down there was going to be enlarged, going to be a great deal larger than expected, and that he would need an engine and crew to be at his command to do whatever work of shifting cars and handling cars as he would want them to handle, and asked if I could arrange to hire him an engine and crew. I told him that I thought we could do so, we had done that before to outside people and I would try to arrange it if he so desired; and he went back to his office, and the next day I got this letter, asking for the exclusive use of an engine and crew, to be assigned to the orders of his company.

Mr. Anderson: I think the letter speaks for itself.

Mr. D. H. Leake: I think the letter speaks for itself.

By Mr. D. H. Leake:

Q. I want to ask you if you replied to that letter, and, if so, when, and whether that (Indicating) is a carbon copy of your reply, and, if so, read it to the court and file it as "Exhibit E. I. F. #2."

A. Yes, sir. I acknowledged receipt of his letter. This is a carbon copy and I recognize it. It's dated Sept. 29th, 1917.

NOTE.—Paper here read and filed, being marked accordingly.

(For Exhibit E. I. F. #2 see end of testimony, page 145 of this Ms.)

Q. This correspondence refers to billing him for the cost at your usual rates, or some words to that effect. I hand you herewith a circular issued by certain officers of the C. & O. Railway Co., dated June 5th, 1917, headed "Equipment Rentals." Will you please explain that circular and what connection that had, if any, with this matter?

The Court: What is the number of that circular?

Witness: It has no number to it. It is called "Equipment Rentals.

Mr. Anderson: We would object to the introduction of that circular because there is no evidence that it was ever brought to our attention or that we knew anything about it. It is purely a matter within the company, itself. We just merely reserve the point.

[fol. 28] The Court: I understand objection is made and the objection is overruled temporarily. I will hear your objection when we come to the argument. When you come to the argument of the case you can move to strike it out.

A. This circular, if you call it a circular, is a memorandum of charges that are authorized by the General Manager of the Railway, sent out to heads of departments, whose business it might be to hire out the railway company's equipment, such as locomotives, freight cars, push cars, steam shovels and various other equipment. It sets out the charges therefor if the equipment is rented out. Bills to the Westinghouse, Church, Kerr Co. for the use of this engine was based on this circular, except that the circular provides for a 25% supervision, and at the time that I wrote the letter to Mr. Bowie in reply to his letter asking for the use of the engine I stipulated in the letter that the supervision charge would be 10%. That is why I so stated, but, when I came to make the bills, I had the circular before me and found out that the charge should have been 25%.

NOTE.—Paper filed and marked "Ex. E. I. F. #3."

(For Exhibit E. I. F. #3, see end of testimony, page 146 Ms.)

Mr. D. H. Leake: We have amended our account. We only claim 10%.

By Mr. D. H. Leake:

Q. Is that the usual charge that was at that time made for this sort of service?

A. Yes, sir, that was the usual charge made by the railroad for the rental of locomotives, according to size and tractive power, etc., and other kinds of equipment.

Q. Do you know enough about it to say whether that is a fair charge for that sort of service? Of course, if you don't, I don't want you to answer.

A. I could only answer that from my experience of more than thirty years, and, with the rental of other equipment that the railroad had to make in times of need, I should say it was a fair charge, reasonable charge. The same charge would have been made to another railroad, the government or anybody, makes no difference who it was.

[fol. 29] Mr. Anderson: I enter of record a motion to strike out the circular and all evidence in regard to same.

The Court: The motion is continued until the case is argued, unless you all want to argue that now.

Mr. Anderson: No, sir. I just want to keep the record straight.

By Mr. D. H. Leake:

Q. After the conversation, which you stated you had with representatives of the Westinghouse, Church, Kerr Co., and after the reception of the letter by you from them on September 27th, what steps did you take, if any, towards complying with their request?

A. I immediately put an engine at their disposal.

Q. I show you carbon copy of a letter, dated September 29th, 1917, to J. R. Carey, who I assume is an official of the company?

A. He was my superior officer.

Q. With certain notations on it. Will you take that letter——

The Court: Is that a letter between officers of the C. & O.?

Mr. D. H. Leake: Yes, sir. I am not going to introduce it, on their objection. I want him to refresh his memory and state the disposition he made of their request.

The Court: I don't think it is evidence.

Q. (continued). I will ask you to refresh your memory and state what disposition you made of the request of Messrs. Westinghouse, Church, Kerr & Co. for an engine and crew?

A. I wrote the general yard master in charge of the yard to put an engine on Monday, and to see that it was kept on, on the Westinghouse, Church, Kerr & Company's business, to be at their disposal. In order to properly bill them it would be necessary to let me have the full cost of all of the crew and everything else that went towards the engine, and I turned it over to the Westinghouse, Church, Kerr & Co. Also wrote the foreman of engine shops, Mr. Ahern, relative to the upkeep of the engine.

Q. Do you know whether an engine was, as a matter of fact, put at their disposal?

A. It was.

Q. Did they have the exclusive use of that engine and crew?

A. They had full charge of the engine, directed by them alto-

gether, and no officer of the railroad, yard master or anyone, had any jurisdiction over that engine whatever. It was the same as if [fol. 30] it did not belong to us as far as the railroad using it was concerned.

Q. Do you know what class of service that engine did, and, if so, state it?

The Court: Can't you state, first, before you do that, what did the engine consist of, what was the crew of the engine?

Witness: The engine and crew consisted of an engineer, fireman, yard conductor and three brakemen.

The Court: How many?

Witness: Engineer, fireman, yard conductor and three brakemen. Sometimes there weren't but two brakemen.

The Court: When was that delivered to them?

Witness: Delivered to them on Monday following September 29th, 1917, whatever date that was.

Mr. D. H. Leake: I asked you what service did that engine and crew perform if you know it.

Mr. Anderson: If you don't know it of your own knowledge—

A. I know it of my own knowledge. There is no doubt about my knowing it. I would say the mode of operation was this: The cars that went to the Westinghouse, Church, Kerr people came in in various freight trains, and those freight trains pulled in what was known as the receiving yard, and such cars as belonged to the Westinghouse, Church, Kerr people were classified into the classification yard and were put in certain tracks in this yard.

Q. Was that yard the railroad company's yard?

A. Yes, sir.

Q. Classification yard?

A. Yes, sir, and this switch engine went to those tracks, under the supervision of the Westinghouse, Church, Kerr people and not the C. & O. yard master, and took these cars out and carried them to the various places of operation of the Westinghouse, Church, Kerr people. At the time it started in camps were being built, and likewise railroad tracks as fast as they could to get to those places where they were building them, and this engine was used in various kinds of work of the Westinghouse, Church, Kerr people, different from what the railroad would be required to use it for.

Q. Explain that difference?

A. If they wanted a car of brick or a car of cement or a car of lumber or ten cars of material, they would take this engine and stand with it and place it where they wanted it to keep the men working to best advantage, and they would take these cars and carry them to another place where the material was needed; and it was extraordinary service that the railroads could not be required under any circumstances to render; and Mr. Bowie stated he would rather have an engine at his disposal.

Mr. Anderson: I think he could describe the service rendered but not what the company was supposed to render.

By Mr. D. H. Leake:

Q. Was it such service as was usually rendered?

A. It was extraordinary service that I had not been accustomed to give. They kept this engine until March.

By the Court:

Q. From September to March?

A. Yes, sir, and they took another one later on. They called for another engine which was given on the same terms.

By Mr. D. H. Leake:

Q. When was that done?

A. I don't remember exactly when the second one was put on.

Mr. Anderson: That is not involved in this suit.

By Mr. D. H. Leake:

Q. That is not involved here?

A. No, sir. The bill covers the use of an engine. They started with one, but later it was necessary to have two.

Q. Mr. Ford, were there many tracks in those camps?

A. Those camps were just lined with tracks. They were just lined with tracks.

Q. Did this engine do anything in the camps?

A. There were a lot of temporary tracks built for the purpose of getting material up to the buildings where they were building sites. Afterwards they were taken up.

Q. You testified, I think, that the railroad built the track up to the camp and that the contractors or the government built the tracks in the camp?

A. In Camp Stuart, yes, sir.

Q. Was the same thing true in reference to Camp Hill?

A. I said it was a little different. The railroad built up to their right of way and went off their right of way in the government right of way and built some tracks for the government in order to hurry things along.

[fol. 32] Q. But the government paid for those?

A. Yes, sir.

Q. So they were government tracks?

A. They were government tracks, but they asked us to do it.

Q. I will ask you what is the custom in reference to the delivery of cars, whether or not it is the custom to place cars that are received by the railroad company more than once?

Mr. Anderson: The obligations of the railroads are governed by the law and the tariffs and not by what may be local custom. I don't want to make objection to this evidence, I don't want to argue it, at this time, but would have to object to it.

The Court: Objection overruled temporarily and continued, to

be argued later on motion to reject. Either side can except to the ruling and it will go in the record.

A. The freight rate on a car entitles the consignee to one placing of a car to be unloaded. I mean by that that, if a car of shoes comes consigned to Mr. Smith, he would have a right to expect the railroad company to place that car at a given point designated by him, provided that its regular place of delivery, and it is the railroad's duty to deliver that car to that place, and, if he wants it moved to another place, then there is another charge made.

The Court: I don't see how this can be material in any event yet awhile.

Mr. D. H. Leake: I don't think it is except for the opening statement of my friend on the other side. I think that is a matter in rebuttal.

The Court: I understand this is a matter of rental. I sustain the objection and strike this out.

Mr. Anderson: As long as he has stated it now, I don't know that we want to strike it out. I think he has got exactly what we want. We withdraw the objection to that.

The Court: All right.

By Mr. D. H. Leake:

Q. Now, I will ask you was this engine and crew used in subsequent placings—You stated that under the tariff they had to place the car in one place?

A. In a place set aside for the delivery of cars.

Q. Where was that at Newport News?

[fol. 33] A. That was on the general delivery tracks.

Q. When you placed it on the general delivery tracks you had delivered it to them?

A. I had made the delivery that I was required to make—public delivery tracks, general delivery tracks. We had two of them, one on the east side and one on the west side.

Q. What did this engine and crew do with those cars that you had delivered on the public delivery tracks, if anything?

A. That is the reason they wanted an engine so as not to have to haul the stuff from the delivery tracks to these camps, which would have been about two miles.

Q. They would have to haul it how?

A. By wagon and trucks. That is the way they started in to do it. When they first commenced to do business we placed cars on the east side delivery and they hauled with trucks from that track to the camp site and continued to do that until the railroad build a track over into the camp, or next to the camp.

Q. Will you state to the court, Mr. Ford, what advantage this engine and crew was to the Westinghouse, Church, Kerr Co.?

A. It was all kinds of advantage to them. It enabled them to keep material up to the men. That is one advantage—keep it near where the men were working, and it enabled them to place the cars, one car at three or four different places, if necessary, and it saved

them the switching charges in switching a car every time it was moved, which the railroad would have had a right to have done.

Q. How about demurrage?

A. Saved them demurrage and saved them time and enabled them to build up the camps quicker, and it was helpful to them in all kinds of ways. That is the reason they wanted it. That is my understanding. They could do what they wanted with it.

Q. Did they use it in their own construction?

A. They used it in all kinds of ways. They used it sometimes to thaw out sand that was frozen. They could use it for anything they wanted to, in reason. I had no jurisdiction over it. It was the same as far as I was concerned as if they had bought the engine and brought it down there, themselves. I had no jurisdiction over it and did not interfere with it except to let it go through the yards as best I could. I *furnishes* the crew for it and kept supplies on it and kept the fires up. They took hold of it and went to the bin [fol. 34] and got it themselves, and had their own yard master and own traffic manager, had a regular organization down there—a big thing—tremendous, big operation, and they just got the engine and went on with it and we never bothered with it at all.

Q. Did they do any construction of their own of railroad tracks during the time they had this engine?

A. Yes, sir.

Q. Do you know whether they used this engine in connection with that?

A. Yes, sir, they used it in connection with all their activities whenever it was convenient to do so, just like I would have done or anybody else.

Q. You don't particularly know about the bills or the amount of the bills do you?

A. No, sir. The bills were made under my general direction but not under my detail direction. I instructed that the bills should be made in accordance with my letter, or contract, with them, and also this memorandum here of charges, and they were made from data furnished from day to day in the way of regular time tickets; in other words, we worked at one time there as many as thirty-two engines, and the crew that worked the Westinghouse, Church, Kerr engine would designate on that ticket that they put in when they knocked off, and whatever time they made was paid by the railroad company and charged to Westinghouse, Church, Kerr Co. according to the way those tickets were put in, and those bills were made from those tickets, together with the cost of water and oils and waste and everything that goes to operate a locomotive.

Q. Mr. Ford, do you know whether this engine was used in shipping cars from one camp to another?

A. Oh, yes, sir.

Q. How far were they apart?

A. Camp Hill was about three and a half miles from Camp Stuart.

Q. You stated they shifted them around in the camps?

A. Moved them wherever they wanted to. I had no jurisdiction over how they could move them. They just took the engine and

used it, and, when they got through with it, turned it in to the round house and knocked off. I had no authority over it, never intended to have any authority over it. I wrote the yard master I turned it over. It was worked under the supervision of their own men. There was no question about that ever raised.

Q. Is that service such as you have mentioned included in the tariff?

[fol. 35] Mr. Anderson: I think the tariff is the best evidence.

The Court: You haven't laid the foundation for that question. He can't vary the written tariff.

By Mr. D. H. Leake:

Q. How long have you been in the railroad business?

A. I was in the railroad business thirty-four years.

Q. Are you familiar with railroad tariffs and that branch of the service?

A. I was in charge of the operating department of the railroad all my life and came in contact with tariffs, especially terminal tariffs a great deal, had to handle them. I am not what you might call an expert on tariffs in a general way or transportation, but I suppose it would be fair for me to say I know about as much about tariffs as far as terminals are concerned as anybody else you would find.

Q. Are you familiar with the application of tariffs as far as terminals are concerned?

A. Yes.

The Court: Now, if there is anything doubtful in the tariff you want to explain, he can explain it. If it is nothing doubtful the tariff speaks for itself.

Mr. Marks: We called for the tariffs. We called for them yesterday. This is the tariff I want. (Indicating.)

Mr. D. H. Leake: Let me see. Maybe we will admit it if it is.

Mr. Marks: You concurred in this, and we concurred in this—switching and absorption tariff.

Mr. D. H. Leake: What do you want with this?

Mr. Marks: I want the whole tariff.

Mr. Anderson: You can introduce the tariff, and, if the case is appealed, we can agree to omit what is not pertinent.

Mr. D. H. Leake: I am not talking about the switching tariff now, but the ordinary tariff which prescribes what service is involved in it.

Mr. Marks: This is the tariff. That is the whole yard movement.

Mr. D. H. Leake: I am talking about the ordinary tariff—when I ship stuff from Chicago to Newport News what service is embraced therein.

The Court: Go ahead and ask a question.

Mr. Anderson: This is the tariff filed for general terminal service, and the C. & O. concurs with the Southern.

Mr. Marks: If Your Honor please—

[fol. 36] The Court: There is nothing before the court. Let's get some question.

Mr. D. H. Leake: Do you object to this evidence?

Mr. Anderson: Unless the tariff is introduced.

The Court: Ask any question you want.

By Mr. D. H. Leake:

Q. Is the service, which you have described, that was rendered by this engine and crew, such service as is embraced within the tariffs at Newport News—tariffs affecting the delivery of stuff at Newport News?

Mr. Anderson: We object to that. He can ask, but of course, the tariff determines whether it is in it.

The Court: I understand that is one of the questions to be determined in this case.

Mr. Anderson: The tariff, itself is the best evidence as to what service is incorporated in the tariff.

The Court: I think that will be true but, if there is anything ambiguous in the tariff he can explain it.

Mr. Anderson: He must first introduce the tariff and point out the ambiguous part of it.

The Court: The objection is overruled at this time.

Mr. Anderson: We note an exception.

A. The bulk of the service that they used this switch engine for was not contemplated by any tariff that I have ever read. It was unusual, unprecedented service; there was no precedent to go by. We had never had any such service asked for and it was unusual, outside of the tariff provisions, the same as unloading a circus or any other work outside of the legitimate placing of cars in the yard; it was a war measure; we never had had any such service asked for before.

Mr. Anderson: I move to strike that out because the tariff is the best evidence of what is included within its terms.

The Court: Motion overruled.

Mr. Anderson: That is excepted to.

By Mr. D. H. Leake:

Q. Under the tariffs, Mr. Ford, how many placement do you have to make on a car?

A. One placing.

Mr. Anderson: Same objection.

[fol. 37] The Court: Same ruling.

Mr. Anderson: Exception.

By Mr. D. H. Leake:

Q. Where can that placement be made, what track?

A. On a track agreed upon by the railroad and the party owning

the commodity, which would have to be either a general delivery, public delivery, you might say, or a private industrial siding.

Q. Was there any agreement as to where those cars were to be delivered that were shifted afterwards by Westinghouse, Church, Kerr & Co. by this engine and crew?

A. No. They wanted to handle their own cars in their own way.

Q. Where would they get them?

A. They got them out on the classification yard tracks. Sometimes they didn't wait for a train to be classified.

Q. Will you explain to the court about that?

A. They would go to the receiving yard and work the cars out of a train that had just arrived for some commodity that they were in a hurry for; they would not wait for the cars to be classified.

Q. Let me ask you: If they did not have an engine and crew which enabled them to do that, could they have gotten those cars out as promptly as they did?

A. No. The railroad would not in all probability have been able to have delivered the cars to them as promptly as they were able to do it by the use of their own engine.

Q. Will you explain that to the court?

A. Because they had full charge of the engine; the engine would be at their beck and call to do whatever they wanted done, move cars or place them anywhere they wanted to place them, take them from one track to another, take them from one camp and put them in another, carry sewer pipe up and do anything else they wanted.

Q. Explain to the court what is meant by classification yard?

A. That is a yard set aside with a lot of tracks in it and each track is designated for certain commodities belonging to certain people. For instance, the Ordnance Department would have a track, Westinghouse, Church, Kerr & Co. have a track, and another big contractor would have a track put in there so that they could go and pick up a bunch of cars that belonged to these particular contractors without having to go to work and reswitch them again.

[fol. 38] Q. Is that an operation that is performed subsequently to the cars being received at the receiving yard?

A. Yes, sir. A train has commodities for everybody. The railroad gets behind that train and shoves it over on what we call the hump, which is a hill. Those cars will be tagged up before the conductor undertakes to break his train up, and he drops the cars on these various tracks according to classification, according to conditions and according to the consignee, so that when that train is finished all the cars for Smith would be in that track, and for the Ship Yard in this track, and for Westinghouse, Church, Kerr & Co. in this track, etc.; and they would go up there to these tracks and get such cars out as they needed first.

Q. Get them out of what track?

A. Out of the classification yard.

By the Court:

Q. Did they have a separate track of their own?

A. Yes, sir, they had two or three tracks. They had so many cars we had to sometimes give up two or three tracks for them to get them in there. They were getting them in there at the rate of four or five hundred cars a day sometimes. Thousands of cars those people handled.

Cross-examination.

By Mr. Anderson:

Q. Will you examine this blue print which I hand you and tell me if that, to the best of your knowledge, is a complete layout of the railroad terminal situation in and about Newport News?

A. Yes, sir, that is a map that shows the layout at Newport News, the government activities, including the railroad company's yard. It is not a detail of the yard, but in general it is pretty correct. It is a map that the railroad had first, and then the government took it and added to it the activities that they built there, including tracks, etc., and elaborated on it.

Q. Then you would say for substantial purposes that is a correct general layout of the yard situation at Newport News?

A. Pretty well.

NOTE.—Blue print offered in evidence and marked "Ex. E. I. F. #4."

Q. I will ask you, Mr. Ford, if you will take that map and identify [fol. 39] there Camp Stuart and Camp Hill, which you refer to?

A. Here is Richmond up here. (Indicating.) Here is Camp Morrison, six miles from Newport News. A freight train comes in here and pulls into this receiving yard.

Q. Is that numbered there?

A. Yes, sir.

Q. What is the number?

A. Number one. That receiving yard, at the time we started in there with activities, was not as big as it is; it was enlarged. This map shows it as it is now and as it was intended to be at the time the government came there, but they built some more onto it during that time. Now, a train pulls in there, and right here is where that hump is.

Q. All in here, you mean, at the end of the yard east of No. 1?

A. East end of the receiving yard, which you have marked No. 1, that is where the hump is. The engine gets in behind the train there and shoves the train slowly over this hump. When it gets up there it is about four feet high, and you raise the lever and uncouple the cars and they roll themselves. This track has a grade to it so that these cars will gradually roll down slowly and go into these tracks. That is No. 2, classification yard. There are twenty-six of those

tracks in here. They are for holding commodities that come in on this yard. These activities of Camp Hill are all laid out in here. (Indicating.)

Q. What is that number?

A. E., F. and I. Camp Alexander, where is that. That is Camp Alexander (indicating)—from the westerly end of Camp Alexander down to about 48th street, or, in other words, it runs to about 70th street, if the map carries the streets that far down; and the movement of the engine that was used was customary to come in this yard.

Q. What yard is that?

A. In the classification yard, at the east end. In order to do that they would have to come down here, go through these interlocking switches. This (indicating) is Fortress Monroe. Come up in here and get his cars out of this track and pull down over these scales here to the clearing point and back up in here into D., E. and F., and cross over sometimes over in here.

Q. Cross over where?

A. Cross over into the Stevedore Camp. It was big activities over there where warehouses had to be built.

[fol. 40] Q. Marked "G?"

A. Yes, sir. They were hay houses. Alexander here, and Camp Hill here and the horse pens here in "F."

Q. Those corrals were where horses were left until shipped?

A. Yes, sir.

Q. The defendant hadn't anything to do with the handling of horses?

A. Not the actual handling of them. I don't know whether they did anything towards the building of pens or not.

Q. Where is Camp Stuart?

A. Camp Stuart is here. Camp Stuart is in a far easternly direction, fronting on James River.

By the Court:

Q. That is not on the Newport News side of the railroad, is it?

A. On the east end of Newport News.

Q. Where is the depot down there where you meet the boat?

A. Right here. Here is where the boat is and here is the yard master's office.

Q. Camp Stuart wasn't between the track and—

A. You branch off before you turn, where you make your last turn going into the depot; you turn around like my finger. Here is Camp Stuart over this way. Here you go into the depot around this curve.

Q. Where is Camp Stuart?

A. Camp Stuart is here. Here is the track I told you about we built.

By Mr. Anderson:

Q. Indicated by a red line?

A. Yes, sir. We built a track from the C. & O. right of way here and across a little creek with a trestle, and built up to this point, which is Ivey avenue.

By the Court:

Q. Is Camp Stuart between Hampton and Newport News?

A. Yes, sir, on the river. Hampton lies in here, and Camp Stuart is fronting on the river. It was known as Pulliam's farm for years.

By Mr. Anderson:

Q. When those cars got down here (indicating), before that engine [fol. 41] was assigned, and you had to handle a great many cars, did you have any tracks in here then?

A. When activities first started I placed cars on this track. You see that little track there? That is the east side delivery track, known as the east side delivery, between Warwick Avenue and the right of way of the C. & O. Railway, and extended from 23rd street to Hampton avenue. That is where the cars were first placed. Commodities had to be hauled from where my little finger is there, which is the right of way of the C. & O. opposite 21st street to Camp Stuart.

Q. After that track was built where did you place them?

A. I put them in the classification yard.

By the Court:

Q. You mean before the rental of the engine?

A. Before the rental of the engine I placed them here (indicating).

By Mr. Anderson:

Q. I am talking about before the rental of the engine, wasn't this track built (indicating)?

A. No, sir.

Q. You didn't finish it then?

A. No, sir.

Q. After the rental of the engine, ending March, 1918, where did you place them?

The Court: Let him answer where he placed them before.

Witness: On the east side delivery (Marking "X" on map).

By Mr. Anderson:

Q. They dispensed with the engine in March, 1918, and you continued to handle their cars for Camp Stuart. Where did you put them then?

A. Over here.

Q. Where?

A. In Camp street.

Q. Making delivery for persons other than Westinghouse, Church, Kerr & Co. at Camp Stuart, where did you make delivery?

A. We put them on designated tracks over there that had been built to take care of these warehouses.

Q. In Camp Stuart track that was built by the government?

A. Yes, sir, built by the government; and after the government [fol. 42] built warehouses, after the Westinghouse, Church, Kerr & Co. completed the camp, it made a place available for unloading cars, which changed conditions, but during the time it was going on this was all being built up.

Q. After this track was completed in here to Camp Stuart, indicated by the red line, and you received cars for the government or for persons other than Westinghouse, Church, Kerr & Co., where did you put those?

A. Over here at these warehouses.

Q. That was during the period after the track was completed or throughout the period of the entire operation?

A. Yes, sir. Sometimes put them in there and sometimes Westinghouse, Church & Co. put them in there.

Q. But delivery was made in here? (Indicating.)

A. Delivery was made in there after this was completed, but, while it was being made a camp, they had temporary tracks all around in here.

Q. During the period of construction the government was receiving a good deal of material for construction, was it not?

A. Not very much for the government. Westinghouse was the whole government.

Q. But the government did receive during the period of construction, as they finished part the government took possession and used it?

A. Yes, sir. After the government built the warehouses, we placed cars every day and unloaded.

Q. Take Camp Hill. When were those tracks constructed indicated by red in Camp Hill?

A. During the war. They were all new tracks?

Q. They were constructed prior to September?

A. No, sir. Afterwards.

Q. Where you had stuff for Camp Hill, before you assigned the engine, where did you deliver?

A. We used the Belt Line along here (indicating).

Q. After those tracks were completed here in Camp Hill, indicated by red, and over here in the old Stevedore Camp, after the engine was assigned to the Westinghouse, Church, Kerr & Co., were such supplies as were consigned to Westinghouse, Church, Kerr & Co. delivered on these tracks here? (Indicating.)

A. After those tracks were built.

Q. You made deliveries on these red lines in these various camps?

A. Yes, sir.

[fol. 43] Q. That applied to all materials for the government or for other consignees than Westinghouse, Church, Kerr & Co.; you left them to handle their own stuff?

A. They handled their own stuff in their own way. That is the way I handled it according to the tariff.

Q. You made delivery under the tariff at these various places in the yard after the tracks were completed?

A. Yes, sir. We put cars in here with switch engines belonging to the railway company.

By Mr. Marks:

Q. Wasn't the contractor who built the roads in this camp receiving material after this track was constructed into the camp? I think his name was Gassaway, the man who built the roads in the camp.

A. Gassaway had built some roads in there.

Q. You placed his cars in the camp on that track, didn't you?

A. Yes, sir, we placed his cars after these tracks were built.

By Mr. Anderson:

Q. The deliveries, pointed out as made on the tracks in these various camps after the connecting tracks were constructed, to the government or to other contractors or consignees than Westinghouse, Church, Kerr & Co., as I understood you to say, were made under your tariffs without charge for the original delivery?

A. Yes, sir. So would the Westinghouse, Church, Kerr Co. if they let me do it.

Q. Then you would have made delivery of these cars to Westinghouse, Church, Kerr & Co. in these various camps if they had let you done it and hadn't taken this engine?

A. He said he wanted to do it himself, and he hired the engine for that purpose.

Q. Mr. Ford, where was your office during this period?

A. I almost had it in my hat.

Q. Everybody did, but I mean where was your actual location as Superintendent of Terminals, down at the pier?

A. Supposed to be there, but nobody could ever find me there.

Q. You said you had some thirty-two engines operating there?

A. At one time.

Q. How far is it from your office to Camp Hill?

[fol. 44] A. About three and a half miles.

Q. How far to Camp Stuart?

A. About two miles and a half.

Q. You couldn't know very well what this particular engine was doing there all the time?

A. Don't you bet your life I didn't.

Q. You mean from reports from there?

A. I lived on that yard.

Q. Could you follow each of these engines over a range of six miles?

A. Easily. I knew what every one was doing, every time they made a move.

Mr. Anderson: I am surprised the C. & O. ever let you leave.

Mr. H. D. Leake: They didn't. He was offered so much more than we could pay him he left of his own accord.

Witness: I don't mean to say I could see six miles, but I knew the work that the engine was doing six miles from me. I knew what he was assigned to do and knew what he ought to be doing, and I had telephones running all over the yard so I could get the conductor at any time.

Q. You got that information from reports over the telephone?

A. No, sir. I lived on that yard myself, so much so that the President came down there and objected to it, and said I ought to stay in my office where people could see me.

Mr. Anderson: Are you going to put those tariffs in?

Mr. D. H. Leake: No.

Mr. Anderson: Suppose I introduce them, with the understanding, if you get the C. & O., they will be withdrawn?

Mr. D. H. Leake: I do not want to introduce the tariff for this reason: I am relying on the contract. When we prove the contract and prove the service we have made out a case. Now, if they want to go into the question of tariffs, that is their end of it, and then, if the tariffs are admissible, we will not object, provided they apply to the C. & O. I don't think it is up to us to introduce the tariff.

Mr. Anderson: I don't care who introduces it, it is a matter of no consequence; what I want to get is whether they have got the tariff. We called for it yesterday. If Your Honor please, there is [fol. 45] a tariff, in which they concurred, and I think it would be evidence against them. I prefer to put in the tariff issued by the C. & O.

Mr. D. H. Leake: We are willing to introduce the tariff if we can find one such as you call for.

The Court: They ask for the tariff, and you will bring it here and let them do what they want to.

Mr. D. H. Leake: I have sent word to try and get the tariff.

Mr. Anderson: We will defer offering it, and, if they don't get it, we will offer this.

The Court: I understand they asked for the tariff, and you will produce it and let them see it.

Mr. D. H. Leake: That is the idea. We are trying to get it. These gentlemen just told me yesterday that they wanted it, and I have been doing all I could to get what they wanted.

Mr. Marks: I understood you to say that they had one copy of the switching tariff, which they would bring up here?

Mr. D. H. Leake: We have the switching tariff in effect at this time.

Mr. D. H. Leake: There is no use keeping this witness on the stand waiting for that. We can do that at any time during the progress of the trial, as far as we are concerned.

Re-examination:

By Mr. D. H. Leake:

Q. You said you made deliveries for others at certain times in these yards at these various camps. Now, in doing that, how many times would you spot cars in a delivery?

A. Once.

Q. During that time would you haul cars from camp to camp, from Camp Stuart to Camp Hill for anybody?

A. Not without a switching charge. They would have a switching ticket. If I placed the car once and they changed their mind and didn't want it there, or didn't want part of it there and wanted it moved, I would make them give me a switching ticket for it, which was four dollars to move that car from one point to another point.

Q. Four dollars a car?

A. It went to five dollars before the war was over.

Mr. Anderson: I object to his statement as to the charge because that is necessarily the tariff charge, and the tariff must be introduced to show. I move to strike out his statement as to the charge.

[fol. 46] The Court: Objection overruled. Whether he made it legally or not is another question. I understand that is a fact, you did charge and collect \$4.00 for switching every car?

Witness. Whatever the tariff provided, whether \$4 or \$5, but this regular tariff switching charge was made for cars placed more than once.

The Court: The tariff is the best evidence. Objection sustained.

Mr. D. H. Leake: I ask him if he made the switching charge for these other people.

Witness: Yes.

Mr. Anderson: I object to his stating what the amount was.

The Court: I understand he says he doesn't know the amount.

Mr. D. H. Leake: He said four or five dollars.

Witness: I meant to try to convey the idea that at one time it was four dollars and sometime during the war it was increased to five dollars. It was either four or five dollars.

By the Court:

Q. You charged, as I understand, whatever the switching charge was?

A. That is the idea.

The Court: You charged it and collected it. Now the best evidence is the tariff itself.

By Mr. D. H. Leake:

Q. Did you charge Westinghouse, Church, Kerr & Co. during the time they operated this engine any switching charges on these cars?

A. No, sir, because he had an engine and I had no record of his handling them. He handled them, himself.

By the Court:

Q. Have you any record of how many cars that the Westinghouse, Church, Kerr & Co. moved during the period from September 17th or 18th through March 1918?

A. No, I haven't any record except the record as a whole. During the war period it was 180,000 cars handled there, about. I have not any record of how many Westinghouse, Church, Kerr & Co. handled.

By Mr. Anderson:

Q. Mr. Ford, I now hand you a letter, dated March 29th, 1918, to J. A. Thomas, Traffic Manager of Westinghouse, Church, Kerr & [fol. 47] Co., and purporting to be signed by you as Superintendent. Will you examine that letter and see if you wrote it and if that is your signature, and, if so, introduce it as "Ex. E. I. F. #5."

A. Yes, sir, I wrote this letter.

NOTE.—Letter read and filed in evidence, marked accordingly.

(For Exhibit E. I. F. #5, see p. 149 of this transcript.)

Witness stood aside.

J. F. SHAFFER, a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Examination-in-chief.

By Mr. D. H. Leake:

Q. What is your business?

A. I am at present Assistant Commissioner of the Newport News Coal Exchange.

Q. What was your business in the fall of 1917 and spring of 1918, and where were you located?

A. I was then clerk to the Superintendent of the Chesapeake & Ohio Railway at Newport News, Va.

Q. Have you a statement of the charges made Westinghouse, Church, Kerr & Co. by the Chesapeake & Ohio Railway Co. on account of services rendered in connection with furnishing them with an engine and crew at Newport News?

A. I have.

Q. In the first place, take up the charge of the C. & O. Railway Co. prior to Federal control, which took place at midnight December 31st, 1917, and state the amount due the Chesapeake & Ohio Railway Co. for its services?

A. The total amount of these bills accruing to the C. & O. Railway Co. is \$7,533.50.

Q. As of what date?

A. As of December 31st, 1917.

Q. Will you file a detailed statement, showing how the amount is arrived at, with your evidence, marked "J. F. S. #1"?

A. Yes, sir.

[fol. 48] NOTE.—Paper filed and marked accordingly. (Exhibit J. F. S. #1, copied on page 150 of this Ms.)

Q. Have you a detailed statement of a similar account for those services due to the Director General of Railroads, operating the C. & O. Railway from the beginning of Federal control, after December 31st, 1917?

A. I have such a statement covering those charges up to and including March, 1918.

Q. What do they aggregate?

A. Total \$5,765.43.

Q. Will you file the statement showing the amount and how you arrived at it?

A. I will.

NOTE.—Paper filed marked "J. F. S. #2." (See p. 156 of this manuscript.)

Q. As of what date is that?

A. March 29th, 1918.

Q. How are those amounts calculated; on what basis?

A. These amounts are arrived at on a monthly basis from the detailed statements that were kept each day and recorded in the regular record books that the railway company always uses.

Q. Will you please indicate what those detailed statements were for, what service?

A. They were for the rental of an engine, or engines, for labor costs, such as engineers, firemen, brakemen and conductors, and for all supplies and repairs to such equipment as was rented to Westinghouse, Church, Kerr & Co.

Q. Do they include the coal furnished and cylinder oil and signal oil?

A. Yes, sir, those are included under the head of supplies.

Q. And grease, waste and water?

A. Yes, sir.

Cross-examination.

By Mr. Anderson:

Q. In effect, that was for the rental and operating charges for the engine under that agreement of September, 1917?

A. It was, yes, sir.

[fol. 49] Q. Your charge there was based upon that agreement and

had no relation to any transportation tariffs or anything of that kind?

A. Oh, no. It was based under the agreement.

Witness stood aside.

W. J. AHERN, a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Examination-in-chief.

By Mr. D. H. Leake:

Q. What is your business?

A. General Foreman, Motive Power Department, C. & O. Railway Co., Newport News.

Q. What was your business in September, 1917, and thereafter, up to April, 1918?

A. General Foreman of Shops.

Q. Whereabouts?

A. At Newport News, in charge of all motive power.

Q. Do you know anything about furnishing an engine and crew by the C. & O. Railway Co. to Westinghouse, Church, Kerr & Co.?

A. Yes, sir. On the 28th or 29th of September (the latter part, I wouldn't say the exact date but I know it was prior to the 1st of October) Mr. Ford called me up and says "We are going to let Westinghouse, Church, Kerr & Co. have an engine of their own." He says "I am leaving you"——

Q. Don't state what he said. Acting upon such information or directions as you had, just state what you did?

A. Notified the foreman of the coal bin that this engine was going to be rented to Westinghouse, Church, Kerr & Co.

Q. Do you know whether an engine was turned over to them?

A. Yes, sir.

Q. You know that?

A. Yes, sir.

By the Court:

Q. What did you turn over to them?

A. We turned the engine.

Q. Just an engine?

[fol. 50] A. Yes, sir, and the engine crew; we furnished the engine crew. We turned the engine and engine crew over to them. The transportation people furnished the other part of the crew.

By Mr. D. H. Leake:

Q. The transportation people furnished the other part of the crew? What do you mean by that?

A. Including conductor, brakemen, etc.

Q. What you turned over was the engine, engineer and fireman?

A. Yes, sir.

Q. The transportation people furnished the others?

A. Yes, sir.

Q. What I want to know is do you know what that engine did, what service it performed of your own knowledge, now?

A. I know it switched in and outside the camps, came out on the yard and got stuff.

By the Court:

Q. Who had control of it?

A. The Westinghouse, Church, Kerr people. They had Mr. Quarles in charge of it.

By Mr. D. H. Leake:

Q. Who was Mr. Quarles?

A. At one time he was general yard master at Richmond for the C. & O. Railway.

Q. What was he then?

A. He was general yard master for Westinghouse, Church, Kerr & Co., or in charge of all the movements.

Q. He wasn't employed by the C. & O. at that time?

A. No, sir.

Q. He was general yard master? What other employees did they have, do you know?

A. Personally I didn't know any of them.

Q. I didn't mean to know them personally, but what duties did they have?

A. I don't know.

Q. Do you know whether those cars were shipped from one camp to another or about in the camps?

A. My duties carried me from one end of the terminals to another. I saw this engine, that is, with Mr. Quarles, switching backwards and forwards both ways. I presume that he was switching——

[fol. 51] Q. Don't say what you presume; I want you to say what you know.

A. I actually don't know; I will not say I personally know.

Q. You saw it in certain service though?

A. Yes, sir in the switching service.

Q. Where did you see it switching?

A. Both directions on the yard.

Q. What yard?

A. On the Newport News yard.

Q. C. & O. yard?

A. Yes, sir.

Q. Did you ever see it down in their camps? Do you know anything about that?

A. Yes, sir. I have been over their camps.

Q. What was it doing when you saw it?

A. Switching cars over in the camps.

Witness stood aside.
Plaintiff Rests.

A. W. BOWIE, a witness on behalf of the defendant, being first duly sworn, testified as follows:

Examination-in-chief.

By Mr. Marks:

Q. Mr. Bowie, what is your present business?

A. I am Vice-President of Bowie-Lydon Co., of Chicago.

Q. Are your headquarters in Chicago?

A. Yes, sir.

Q. What was your occupation or employment in 1917 and '18?

A. I was employed with Westinghouse, Church, Kerr & Co., of New York, as engineer in charge of construction of embarkation facilities at Newport News.

Q. Were you in charge of all operations down there?

A. Everything.

Q. Mr. Bowie, do you know what arrangements Westinghouse, Church, Kerr & Co. had with the United States Government to construct the port and camp at Newport News and embarkation facilities?

[fol. 52] Mr. D. H. Leake: I want to save an exception to that. I don't understand that the railroad company is concerned with their contract with the government. You can let it go in subject to the same ruling you made before.

The Court: Very good.

By Mr. Marks:

Q. I hand you a contract which purports to be a contract between Westinghouse, Church, Kerr & Co. and the United States Government, covering the construction work which the Westinghouse, Church, Kerr & Co. did at Newport News. Will you look at that contract and state whether it is the contract the Westinghouse company operated under?

Mr. D. H. Leake: I object.

A. Yes, sir, this is the contract we operated under.

NOTE.—Paper filed as "Ex. A. W. B. #1."

(See Exhibit A. W. B. No. 1 at p. 161 of this transcript.)

The Court: The court continues the motion to reject this evidence until the argument and will take it up on a motion to reject.

By Mr. Marks:

Q. When did you arrive at Newport News with your subordinates to take charge of the situation there?

A. It was the last of July; the exact date I don't remember.

Q. What were the conditions that you found there in reference to railroad facilities?

A. At that time the only siding constructed was a siding in the animal embarkation camp at the north of the town; there was available space for four or five cars on the team tracks down town.

Q. What facilities did the C. & O. Railway have at Newport News for the delivery of cars consigned to the Westinghouse company?

A. They gave us space down in here (Indicating on map), somewhere between 20th and 21st street, at this place marked by Mr. Ford "X" on this map.

Q. What was that track designated as?

A. I don't know. It was a general delivery track, it had that [fol. 53] appearance; it was a stub track built there, probably used as a general delivery track.

Q. What was the capacity of that track?

A. About four cars as I remember.

Q. At the time you went to Newport News that was the only track that the C. & O. had available for delivery of cars consigned to the Westinghouse Company?

A. Yes, sir, for the work that we started at that time. We were starting down in here (Indicating on map). They had this track already built at the north side. This siding was in at the animal embarkation camp.

Q. What work were you performing at Newport News when you first arrived?

A. Constructing what was known as Camp Stuart.

Q. At that time had this siding been constructed in Camp Stuart?

A. No, sir.

Q. When was that siding constructed and by whom?

A. It was completed by the C. & O. to our property line on September 1st; that was to Ivey Avenue. In the meantime we had started at the other end and were building down and we built and tied into them at Ivey Avenue on September 1st.

Q. So, the C. & O. constructed and completed by September 1st the siding leading into Camp Stuart from the main line of the C. & O. to Ivey Avenue?

A. They had it so we could run over it. This railroad crossing (Indicating) wasn't in, but we built a temporary crossing and threw cars across and we had service with it.

Q. By September 1st your company, the defendant in this case, had constructed the siding as shown in red actually within the boundaries of the camp?

A. Yes, sir.

Q. After that siding was constructed where were the Westinghouse Company's cars placed and delivered by the C. & O.?

A. On that siding inside the camp.

Q. Did they put them in the camp, themselves?

A. Yes, sir, put them in the camp, themselves.

Q. Did the C. & O. make any switching charge for cars that they actually placed in camp on that siding, themselves?

A. No, sir.

By the Court:

Q. What time was that?

[fol. 54] A. That was after September 1st between September 1st and September 26th, 27th or 28th, along there.

By Mr. Marks:

Q. By whom were those tracks, shown in red along in Camp Hill, constructed?

A. Camp Hill siding was built to a point about three car lengths from the road by the C. & O.; we extended the track to give us working room that way into Camp Hill. This hay barn siding was built completely by the C. & O. Railway up past the barn. The storage yard was built by the C. & O. to their right of way line and we installed the other tracks there. The animal embarkation siding was built completely by the C. & O. Sidings for warehouses Nos. 1 and 2, marked "E" and "D" on this map were built by us, using material furnished by the C. & O. The C. & O. made the connection between their tracks and the sidings on their right of way. The siding used for the brewery warehouses was already in place, evidently built by the C. & O.

Q. What is that designated on the map?

A. "C." The tracks, we call them 3 and 4, in the lower yard were part of the facilities of the C. & O., presumably built by them—marked "3." These sidings in here were used for the administrative building, and all the facilities down town were team tracks or other tracks in the C. & O. yards, which they turned over to us for our use.

By Mr. D. H. Leake:

Q. When?

A. At the time that work came along. That work came up at various dates. They assigned us track facilities if they had them when we had to start work. I haven't got the exact date when that work was started.

By Mr. Marks:

Q. Begin at the inception of this work at Newport News and state to the court in your own way, covering the situation as fully as you can, the conditions which existed there and the situation which led up to the assignment of this engine for the work of the Westinghouse Company?

A. We had advance notice that this contract was to be awarded to us and had purchased prior to our arrival in Newport News

about two hundred cars of lumber, and on our arrival there some of those cars had already been received in the yard. It was our [fol. 55] understanding then that arrangement had been made between the C. & O. and the city to build a siding into Camp Stuart, and, as is usual with all our construction work where we have sidings, we had expected when we arrived there that the C. & O. would deliver these cars to us on the industrial siding inside or adjacent to our work, but, lacking this, we used facilities nearest to the camp and trucked our lumber in. After September 1st the C. & O. were able to make deliveries to us on a new siding in Camp Stuart, but, as our volume of business increased, we experienced more and more difficulty in obtaining the necessary service on the tracks; in other words the C. & O. would have cars in their yard for a week or ten days or two weeks before they would deliver to us on our siding, principally through the lack of, as they put it, train crews or engine facilities or some other thing, so that we had very many conferences with Mr. Ford with a view of eliminating this condition, and he finally stated to me that the only possibility of their being able to make these deliveries of material to us in time to avoid delays in the construction work would be by assigning to us a locomotive. Meantime we had had about a thousand cars received up to that time and a large part of the cars were buried in the storage tracks in the C. & O. yards, and we had labor agents our—

Q. Let me interrupt you. Why were cars buried in the yard?

A. You see, cars were received at two ends in the town. They came over floats from Norfolk, and from Richmond through the north yard. The yard is poorly designed; it is an old yard, and there were two or three throats where the tracks came down to a point, and oftentimes a train of cars would come in and be broken up and the C. & O. would attempt to make deliveries. Some of those cars could not be delivered and would be left on storage tracks. Before they could be reached next morning another train would come in and more cars shoved on storage tracks. In other words, cars piled up because their facilities were not equal to the distribution of those cars to their designated points. The C. & O. of course had many calls upon them other than from us. The government was receiving freight and local dealers were receiving freight, and Mr. Ford's point was, if we had a locomotive assigned to our work and our work alone, we would have more or less control over it and it would be, as he expressed it, a handy alibi to the other fellow who wanted a car placed. On about September 28th I instructed our Mr. Smith, traffic manager, to see Mr. Ford [fol. 56] and see what arrangement he could make for a locomotive. Mr. Smith reported to me—

Mr. D. H. Leake: I don't think he had better state that. I object to his stating what Mr. Smith told him.

The Court: Who is Mr. Smith?

Witness: He is my traffic manager.

The Court: Not what was said between you and Mr. Smith.

Witness: I don't know how to word it and make it legal.

The Court: Just state that, acting upon advice, you did so and so with the C. & O., whatever you did.

A. (continued). Acting upon the advice of our traffic manager I called Mr. Ford on the phone and told him I understood he intended to assign a locomotive to us, and he told me, as I remember, that he would do so, provided he could obtain a train crew or engine crew to operate it, and asked me to write him a letter asking for such service. I did not care to write a letter covering the service and told Mr. Ford so. It finally developed, if I would write a letter, we would get a locomotive, otherwise we would not. We happened to be in war and we had to get things done, so I wrote a letter to Mr. Ford, couched in about the words he suggested, and in about a week later we obtained a locomotive to use.

By Mr. Anderson:

Q. The letter, to which you refer, is the letter introduced by Mr. Ford in evidence this morning?

A. Yes, sir.

Q. The 28th of September, 1917?

A. Yes, sir. At the time this locomotive was obtained we talked over several ways of handling the freight there. In other words, the C. & O. was up against it, and it was not a case of their not wanting to deliver; it was a case of being impossible to deliver, and we had several conferences to make arrangements to clear up the whole traffic situation in the yard, because, while we were receiving two or three hundred cars a day, the government was receiving cars and we had to keep the tracks clear, otherwise there would be an embargo placed on Newport News and we couldn't get material past Richmond. We had to perfect an organization all through the South at every division point to get cars into Newport News, and the yard conditions there were practically nullifying [fol. 57] everything we were doing to get cars in, because cars were coming in and lying over after arrival and got no attention, so to save us the locomotive performance gradually grew up. It started out with the idea that the C. & O. would be able to deliver us cars on specified tracks which was found to be absolutely impossible; in other words, they were never able to deliver cars when they expected to, so eventually we used the locomotive as part of the yard facility. We switched our cars out of incoming trains, we took them down and put them over the scales and weighed them, we switched out government cars, we switched out local consignees' cars; in other words, we handled as far as our job was concerned the traffic in the C. & O. yard consigned to us. During that time we probably had to shift some cars, maybe ten or fifteen cars would be an estimate, from one camp to another camp, but the bulk of the service was delivering cars to our industrial sidings at various camp sites, hauling out empties, classifying empties, making them up into trains for the C. & O. to deliver off of their line. During

that time in order to handle that yard system, we put clerks in the yard cabins to assist the C. & O. men. We took off their hands the tagging of all cars belonging to us; we furnished a yard master to supervise our own traffic through the yard, furnished all labor to keep a record of the cars that arrived for us in Newport News, and that record was really the only complete record of cars that were ever received by us. It was used during all the job by the C. & O. to correct and complete their records of shipments to us at Newport News.

By Mr. Marks:

Q. How many cars did you receive there at Newport News, approximately, during this period?

A. Between six thousand and sixty-five hundred.

Q. From what points did they come as a rule?

A. The bulk came from Florida and North and South Carolina points. Some shipments of gravel from Virginia, clay products from Ohio.

Q. Mr. Bowie, you stated a moment ago, as I understood you, that the engine was used in shifting cars in the C. & O. yard. How much shifting, if any, was done in moving cars from one siding, where they had been placed for unloading, to another, or from one camp to another?

A. Twenty cars of the 6,500.

Q. You estimate the number of cars so moved at twenty out of the total?

A. That is the estimate we moved. The C. & O. moved five [fol. 58] or six for us early in the game, for which we paid switching charges.

Q. Let's go back and take up this general situation in some detail. When you first went to Newport News you had a team delivery track with a capacity of four cars?

A. Yes, sir.

Q. Was your material on your cars placed on that track by the C. & O.?

A. By the C. & O.

Q. How did you get your material to Camp Stuart?

A. We had some automobile trucks hauling it.

Q. You unloaded cars on the team track, which is marked "X" on the blue print, and hauled them to Camp Stuart?

A. Yes, sir.

Q. Why were those cars placed on the delivery track at that time?

A. It was the nearest track to our camp that we could get for service.

Q. In other words, that was the most convenient facility?

A. Yes, sir.

Q. What was the condition of the C. & O. yard in general at this time; that is, was the traffic normal and were the facilities which the road had equal to the load, or was there a congestion, or what was the condition?

A. At the time you are speaking of the yard was congested; in other words, the traffic, which they had even then with British and other exports, made the yard overloaded, and its physical condition was poor. They had a lot of poor ties in there. We had frequent derailments.

Q. Was the C. & O. able to make deliveries promptly?

A. No, sir.

Q. What happened to the cars that would come into the yard which they were unable to deliver?

A. They would be dropped on the storage track somewhere.

Q. Were cars stored on any particular storage track?

A. No, sir, sprinkled all through the yard. They would lose record of them.

Q. Have you any idea how long cars consigned to the Westinghouse Company stayed in these storage tracks?

A. We dug some out that had been in there six months.

Q. That the C. & O. had never delivered?

A. Yes, sir.

Q. When that camp was constructed into Camp Stuart did the C. & O., between September 1st and September 28th, when this en- [fol. 59] gine was ordered make delivery of Westinghouse cars on the Camp Stuart track? *

A. Yes, sir.

Q. Did they put them in the camp or just on the border of the camp?

A. They would bring them in and spot them for us the same as they would for anybody who has an industrial siding. When we knew where we wanted them, they would place them for us.

Q. They would actually bring some into camp and put them on the siding where you wanted them?

A. At the place we wanted them.

Q. Why, if they had been putting cars in the camp, did you request the special assignment of this locomotive for the Westinghouse work?

A. Because their service broke down and we were not getting cars.

Q. Why did the service break down?

A. In my judgment it was lack of help, poor condition of engines and poor physical condition and design of yard; in other words, the yard was absolutely entirely swamped; it was trying to handle more traffic than capable of doing.

Q. What class of work was this engine primarily used for, that is, in reference to service which the C. & O. would have rendered in the event an engine had not been particularly assigned?

A. It did exactly the same thing that the C. & O. ought to have done for us. It took cars from wherever it could get them in the yard, whether from a train arriving or from the classification yard or the receiving yard or floats, and put them into the designated siding on one of our various jobs.

Mr. D. H. Leake: I object to that part of the testimony which says what the C. & O. ought to have done.

A. (continued). It did the things that the average railroad does for a contractor when he is contracting on a job. You can put it that way.

Mr. D. H. Leake: I want to save that point.

The Court: All right, sir.

By Mr. Marks:

Q. Did you find it necessary to place men at any particular points in the yards to locate your cars?

[fol 60] A. Yes, sir, we had a man at both the float cabin and what they call the NY. cabin, that is the yard to the north where trains from Richmond come in.

Q. What were the duties of those men?

A. When the trains came in, the conductor or whoever was in charge left at the cabin the list of the cars and their contents. These men would take from these records the cars consigned to us, a record of their contents and pass them on to our traffic department or to the main office, and on advice from him as to the disposal of these cars, they would prepare tags, and it was noted the signing to which it was to go, and the material, etc., and they would go down through the train and place these tags on the cars.

Q. Ordinarily does not the railroad company furnish you notice of the arrival of cars and place them upon notice from you?

A. Yes, sir.

Q. Did you receive any notices from the C. & O. as to the arrival of your cars during this period?

A. We received few, but very few.

Q. Did the C. & O. have any record of the cars which had reached the yard and which were on the various storage tracks for the Westinghouse Company?

A. None that we could find.

Q. Did you ever make application for such record?

A. Yes, sir.

Q. To whom did you apply?

A. We applied to the C. & O. Railway Co. Of my own knowledge I don't know exactly the man to whom we applied.

Q. Did you have, in addition to the clerks at the two entrances to the yard, other employees of the Westinghouse Co. engaged on the yard in locating cars?

A. We put a man in there and used him as you might say as a general yard master, who had general supervision of our freight operations in the yard. He was really a material distributor but he had general charge of the operation of all cars.

Cross-examination.

By Mr. D. H. Leake:

Q. Your company had exclusive use of the engine and engine crew and certain brakemen during that period, didn't it?

A. So far as I know.

[fol. 61] Q. You say the C. & O. ought to have done that, anyhow?

A. Surely.

Q. Ought to have furnished you with a special engine and crew?

A. I didn't say that. I said the C. & O. should have put our cars in the various sidings.

Q. Mr. Bowie, that enabled you to get service that you could not possibly have gotten otherwise under the conditions which were then existing, isn't that true?

A. It's true, or we would never have applied for the locomotive.

Q. Didn't you waive notice of the arrival of cars?

A. No, sir.

Q. By the use of this engine weren't you enabled to go into the yards and pick your cars out?

A. We had to do it.

Q. Pick your cars out from the cars that were arriving there, which you say were arriving in great numbers to other consignees such as the government and merchants and other contractors?

A. Yes, sir.

Q. You were enabled by this engine to go in and pick your cars out from the mass and carry them to your camp, isn't that true?

A. We had to do that to get them, yes, sir.

Q. It enabled you to do that, the use of this engine, which people couldn't do who didn't have this engine?

A. There was no advantage in being able to do that.

Q. There was no advantage in that?

A. No advantage in the world. That just meant work and expense for me.

By the Court:

Q. There was great congestion down there, wasn't it?

A. Yes, sir.

Q. Why wouldn't it be an advantage to get your cars out and other people's cars being left there?

A. The point is this, sir: If the C. & O. had switched their trains, classified their trains as we would normally expect a railroad to do, we would have much preferred to take them off their classification tracks than go in and switch a whole receiving train to get a few cars out.

Q. It was not a normal condition?

A. No, sir.

[fol. 62] By Mr. D. H. Leake:

Q. I was referring to such conditions as were, which everybody knows were abnormal. This engine enabled you to get your stuff out ahead of other people?

A. Not ahead of other people. The government got theirs first.

Q. Ahead of other people other than the government then?

A. Yes, sir, we got them; we had to have them,

Q. You were willing to pay for it, were you not?

A. We pay for what we have to pay for.

Q. Now, didn't the use of this engine save you demurrage which necessarily would have accrued under the conditions which existed?

A. I don't think so. I don't think so.

Q. Have you any idea how much demurrage you paid during that period?

A. Seven or eight hundred dollars as I remember.

Q. Can you state how much you have paid in other camps where you didn't have an engine and crew?

A. We never paid any more than on that job. If I paid any more demurrage than that on any job I probably would have been fired before now. Ordinarily we will not stand for demurrage charges. It is my job to keep clear of them.

Q. That is not much demurrage for 7,000 cars, is it?

A. No, sir.

Q. In fact, it is practically negligible?

A. Yes, sir.

Q. For present purposes I merely want to know how much demurrage you did pay. Now, it saved you switching charges, too, didn't it?

A. It might have saved us eighty or ninety dollars.

Q. Is that all you figure?

A. Yes, sir, because I don't believe we switched over twenty cars.

Q. You said you switched about twenty from one camp to another?

A. Yes, sir, that is my estimate.

Q. I mean to say that you estimated that?

A. Yes, sir. We didn't keep any specific record of that. I know it was very few, because we were getting some kind of material always coming in.

Q. Didn't you switch cars around in your own yard night and day?

A. Only when we made our switches. You understand how material comes in. We had long sidings. We didn't have tracks all around the job. We had one siding. We would make this [fol. 63] drag in the yard the same as the C. & O. would. We would shove them into the camp siding at about 9 o'clock in the morning and switch out the empties, and at half past nine to ten when we got through, we would put our drag into Camp Hill and another into the warehouse and so on.

Q. Wouldn't you shift cars around your yard?

A. No, sir, only shifted in the yard by cutting stuff out of trains into the classification yard or receiving yard.

Q. I am talking about moving cars from place to place?

A. No, sir, very little. I estimate it might be twenty cars were moved at the tail end of the job and we had surplus material at Camp Stuart.

Q. Wouldn't you move cars to where you wanted to unload them?

A. We would put them where they belonged to start with.

Q. Wouldn't you have sometimes cars that couldn't be put there and had subsequently to move some to the same place?

A. It was a regular eel proposition. Cars came in in a lump and went out on one side. We might have shifted a car around once in a while, but we didn't use the locomotive to do it, didn't have time.

Q. The switching problem became heavy there on account of the work at the various camp sites, didn't it?

A. It became heavy on account of the amount of traffic coming into Newport News.

Q. I asked you if it didn't get heavy on account of the work at the various camp sites, of which you had two?

A. Our supplies of course ran up to peak. I don't quite get the connection between the camp sites and switching.

Q. I will read your letter of September 28th: "We believe the switching problem is getting so heavy on account of the work at the various sites it would be desirable for you to assign us an engine."

A. That is true. We started to build Camp Stuart and the government kept adding, and every job meant a new siding and every job meant more material.

By the Court:

Q. When you went down there and had a contract with the United States Government did that include just Camp Stuart or other camps?

A. It said embarkation facilities.

Q. What did you have in your mind when you made the contract with the United States Government—Camp Stuart or all of these other camps?

[fol. 64] A. We figured on Camp Stuart and one warehouse, the so-called brewery warehouse.

By Mr. D. H. Leake:

Q. Credit approved for a million dollars. A million dollars was in somebody's mind, wasn't it?

A. That is what I couldn't overrun. We got that increased the day we got to Newport News.

By the Court:

Q. I mean when you went down there you didn't have any idea of the extent of the job?

A. No, sir, only that.

By Mr. D. H. Leake:

Q. When did you first make this point that you were doing work that the railroad ought to do, anyhow? When did you first make the claim which you are making now, and say that you were doing work under this contract that the railroad ought to have done, anyhow, which you have stated just now?

A. The first time I talked to Mr. Ford probably.

Q. Isn't it a fact you didn't make it until after the work had been done?

Witness: You mean regarding this specific bill?

Mr. D. H. Leake: Yes.

A. Probably not because we didn't get any bill for four months after we started the locomotive.

Q. You didn't say anything about that point until after the work had been done?

A. No, sir, because we were given to understand there was no charge to be made for it.

Q. Who gave you to understand?

A. Mr. Ford.

Mr. D. H. Leake: I object.

The Court: Overruled.

Mr. D. H. Leake: I note an exception.

By Mr. D. H. Leake:

Q. Didn't you recommend to the government to pay this money?

A. Yes, sir.

Q. You mean to say you did that if you understood there wasn't going to be any charge for it?

A. I made that after I had the bills rendered to me, and, as a bookkeeping proposition we of course put it up to the government. We were simply agents for the government. They had the final [fol. 65] say.

By the Court:

Q. You mean to say you thought the government ought to pay something and you ought not and you were agent for the government?

A. I didn't put it that way.

Q. What do you mean?

A. I said we were given to understand when this service was entered into.

Q. I asked you what did you mean by you recommended the government to pay it and still you ought not to pay it; that you, the agent of the government, ought not to pay it?

A. I didn't know I made such a statement.

By Mr. Marks:

Q. Mr. Bowie, after this claim was presented and the bills rendered, was there ever any conference at which a compromise was considered?

A. I personally——

Mr. D. H. Leake: I object to any evidence of a compromise.

Mr. Marks: I am not going to show any compromise.

The Court: I don't think that is evidence.

Mr. Anderson: Isn't it proper to show, since he recommended to the government payment of the bills, that that was the circumstance under which the recommendation was brought out?

The Court: He can make any explanation he chooses as to why he recommended the government to pay it.

By Mr. Marks:

Q. Was there such a conference held?

A. We had several conferences.

Q. Was an offer of settlement ever made by the C. & O.?

A. Not when I was present. My conference was with the government representative.

Witness stood aside.

WALTER SEYMOUR, a witness on behalf of the defendant, being first duly sworn, testified as follows:

[fol. 66] Examination-in-chief.

By Mr. Marks:

Q. By whom are you employed?

A. For myself. I am in business for myself.

Q. Now?

A. Yes, sir.

Q. By whom were you employed in the latter part of 1917 and 1918?

A. By Westinghouse, Church, Kerr & Co.

Q. Where were you located?

A. At Newport News. I arrived there the 13th of September.

Q. Did you have a title there?

A. Not officially. I was known as material distributor on carload movement.

Q. State, in your own way, the facts and circumstances pertaining to the general traffic situation at Newport News and the conditions that confronted the Westinghouse Company and the service this locomotive rendered?

A. Well, I started to function there on the 14th. I arrived there on the 13th of September, 1917; that is when I arrived and that day I looked for a place to live, and on the 14th and for about a week afterwards I was getting up data in relation to cars that had come in and material movements in connection with the traffic department work; and along towards the latter part of December, the last ten days, I frequently had to call up the C. & O. in order to find out if cars were in the yard; in other words, we would get notices from shippers in various forms, either in the form of bills of lading or letters or invoices, or from men that we had out at points of origin expediting the movement of material, giving us the numbers and initials of cars in which material was placed, and we would keep a record of those cars and get in touch with the C. & O. to find out whether they had arrived. That continued up to the first of October. Then we had men out in the yards also spotting cars to

find out whether or not any of our cars were there and hadn't been reported as having arrived by the C. & O. Railway Co. At that time the C. & O. were doing the switching, themselves; but frequently, even during the time from the 14th of September to the 1st of October, I would call up the C. & O. and ask them to spot certain cars which we knew were in their yard and get them delivered on our siding because we wanted the material. Information regarding the placing of material came to me through Mr. Bowie or Mr. Lydon, [fol. 67] who was general superintendent of the work, and Mr. Lydon I consulted most every morning. After we got the engine, the cars, as far as our notice of their having been shifted or their movement, came under my supervision, and as I would get the car numbers and information concerning any carload movement, or even l. c. l. movement, if it was material that we wanted particularly, I would keep in touch with the railroad company and find out whether or not they had been received. Now, along in the first of October we stationed our own man at the North yard cabin, had a night crew and day crew, two men, night and day, and we also had a man at night and a man during the day at the float who did nothing but keep track of incoming trains. They would immediately report to me car numbers and initials of any cars that were shown as having been consigned to Westinghouse, Church, Kerr & Co. on the railroad manifest. Then I would give them information as to where those cars were to be spotted at the various sidings, whether Camp Stuart, Camp Hill or at the brewery. If there were any cars in these trains that they suspected might contain material for us and they had no records, or rather the C. & O. records did not clearly indicate whether they were consigned to us or not, I would look over my record of cars that were en route and advise them the initials and numbers of cars so that they could identify them, which was frequently the case that they did, because sometimes the C. & O. records at that point were not clear. That was my general function in the organization. I would report to Mr. Quarles every morning by phone or verbally, giving him the numbers of certain cars and telling him on what tracks they were to be found and telling him where I wanted them. In the meantime the men stationed at the north yard and at the float would put tags on these cars, also designating them, and in addition to that would give him the numbers of the cars, and I would confirm that usually by memorandum, particularly in special cases where I wanted certain specific material to go in there and just the position I wanted it put in; then I would give it to him in writing. In addition to that we used to go down through the yards every Sunday; all of the traffic department went through the C. & O. yards from one end to the other and searched every track that they had there from the north yard right down, and all of those little stub tracks, and we found any quantity of cars buried down there which the C. & O. had absolutely no record of; they had no record of their arrival and couldn't tell us anything [fol. 68] about them. We discovered those cars down there and gradually got them worked out. In some cases the cars were off the track; they were on stubs that had the rails all torn up; they

had to relay rails to get a locomotive down there. It took us weeks to dig out and cover the yard and comb it and ascertain what was there; and to my personal knowledge, or, rather, I don't say to my personal knowledge, but in many, many instances, I would have called up the C. & O. offices, Mr. Springer's office, I don't know whether Mr. Ford's office, but the yardmaster's office, to ascertain information in regard to certain cars, and they could give me none, and yet those cars I found were on their sidings, buried down, probably in some cases off the track, as I said before, and should have been delivered to us weeks before they actually were. That covers a general outline of my function.

Q. Explain the use made of this engine assigned to Westinghouse work?

A. The use of this engine was to facilitate; in other words, before any engine was assigned, the C. & O. could not, for what reason I don't know except that I assume it was from lack of proper motive power, give us proper switching attention; in other words, there were days when we did not get cars at all at Camp Stuart. That naturally was a serious thing because we were using material as fast as it was coming in; we were unloading cars, primarily lumber at first, and those cars would be unloaded inside of a half or three-quarters of an hour sometimes, because the lumber was wanted. We had a large force and they would use it about as fast as it came in.

Q. How many men were there?

A. I don't know of my own knowledge. I know that they had a little later six or seven thousand men, eight thousand men I think on the pay roll at one time, but I couldn't say positively. Now, at that time either Mr. Thomas or myself would call up the yard master's office and ask them to be sure and get in certain cars which we knew were down in the yard. Sometimes we got them and sometimes we did not. The situation got to be such that, if we wanted to go ahead and proceed with the work and keep the men busy and get anything accomplished, something had to be done as regards the switching service to improve it to such an extent that we could get the material which was due us. Now, once in a while—Of course, there was being work done down at the brewery at the same time. Once in a while a car would get in Camp Stuart and we would find we needed that material more urgently at the brewery. Then, [fol. 69] again, sometimes the C. & O., themselves, made a mistake and put a car in Camp Stuart which should have gone to the brewery. In those cases, up to the 1st of October and from the 13th of September, we would have the C. & O. make the switch, but in every instance the proper switching charge was agreed upon with the C. & O. Railway, so that there was no question as to what we were going to pay and what we were not going to pay, and those bills I presume were properly passed. I don't know anything about the billing. Now, after that time when we had our own engine, it was very rare that we had to make a switch between various sidings which we were using. Once in a while urgency at one point for material which we had at another point would require that a car be shifted out and taken from one siding and put onto another siding;

and our system was such that we knew, before those cars were taken out of the C. & O. yard, exactly where they were to go and where we wanted them to go. We knew what was there as far as it was possible for our organization to keep track of it. It was very seldom we had to make any reswitching. Now, as far as spotting is concerned, just how much spotting was done, extra spotting, I wasn't in the yard all the time, I was inside, and I don't know. I have ridden on the engine, but am not in a position to testify how much respotting was done, but I don't know that there was much of it.

Q. Mr. Seymour, was this engine used in delivering cars from the C. & O. classification yards and other yards over to Camp Stuart and other sidings?

A. Yes.

Q. Was the engine also used in getting out those cars which had been buried on the various storage tracks you have mentioned?

A. Yes, sir, to my positive knowledge, because I have been down on the engine when they dug out those cars.

Q. What was the bulk of the service that that engine was used for?

A. Of course, the engine was tied up for many hours during the day when it couldn't cross the C. & O. tracks to get at cars; in other words, there is a bottle. With the formation of the yard, coming down the main line, you get down to a certain point and it forms a bottle, and freight trains have to cross the right of way of the main line track. If there is any other movement, or passenger movement, the freight movement is held up, and frequently I have [fol. 70] known our own engine to be held up two hours or more, idle, because it couldn't move. When they were running coal trains down to the coal chutes, that again would cause a tie-up of traffic.

Q. What I meant by the question was, what service primarily did this engine do? Was it shifting cars in the C. & O. freight yards and delivering those cars or was it working inside the camp or what was it doing?

A. It was out in the C. & O. yards and working, actually shifting cars into the camps or bringing them into camp. It would make a drag in the morning to one siding, and another, say, at the brewery siding, at a later hour another at Camp Hill, and the rest of the time the engine was out in the C. & O. yards collecting cars and getting them into shape to switch to our sidings.

Q. In other words, you were doing switching service in the C. & O. yards which the C. & O. would have rendered, were you not, had you not had this particular engine assigned to your work?

A. Yes.

Mr. D. H. Leake: I object to that question.

The Court: Objection overruled.

Mr. D. H. Leake: Exception.

Witness: I will tell you a little differently. As a matter of fact—

The Court: I thought you had answered it.

Witness: I can perhaps elaborate a little. The engine was very

little in the yards. It was primarily out on the C. & O. tracks switching around in our sidings.

By the Court:

Q. How many miles of private tracks are embraced in the yards of the various camps down at Newport News that you all built?

A. I couldn't tell you exactly how many miles, but at Camp Stuart, up to the time I was transferred from there the last of December, they had two sidings that came in from a point at Ivey street where our lines met the C. & O. lines right straight down. At that time they were putting in two or possibly three tracks into the warehouses. Up at Camp Hill they then had—At first they were using the Belt Line tracks and then they got spurs inside our camp and had two lines of them parallel with the warehouses in operation at that time. The brewery was practically a C. & O. switch there anyway. There was another spur that came around up this way (indicating) that they used at Camp Hill first that held about six or seven cars. Now, altogether I couldn't tell you how many miles of trackage. That is up to the time I left.

NOTE.—At 2 P. M. a recess was taken until 3 P. M., when the examination of the witness was resumed.

By Mr. Marks:

Q. Mr. Seymour, from your present knowledge of the situation there at Newport News during this period, was the use of this engine from a financial or monetary point of view an advantage or disadvantage inasmuch as it necessitated the Westinghouse, Church, Kerr Co. maintaining an expensive organization in order to locate the cars and get them in?

A. There was no advantage at all.

Q. Why did the company go to that expense, do you know?

A. The only reason that they went to that expense that I know of is to enable them to get material and locate it when it was in the yards of which the C. & O. had no records. In other words, the C. & O. or any railroad is supposed to have the tracks checked up every day. Their system for some reason or other simply fell down, they did not know what was in their own yard, and it was necessary for us to go down and check their tracks up and perform work which was purely the function of the C. & O. to do in order that we might have some intelligent information as to what was in this yard for us. Frequently the C. & O. would call us up from some of their offices, would call me up personally and ask if I had any information regarding cars which they were looking for and which were not for Westinghouse, Church, Kerr & Co. The government officials (I mean the Army) called us up and asked us for such information because the C. & O. could not give them that information, they had no records.

Q. In other words, then, the Westinghouse Company went to

this expense of maintaining the organization that they had in the yard and requested the assignment of this locomotive particularly to the work of handling their cars because the C. & O. Railway was unable with the facilities it had to do the work itself?

A. That is right.

[fol. 72] Cross-examination.

By Mr. D. H. Leake:

Q. Now, Mr. Seymour, your idea is that Westinghouse, Church, Kerr & Co. entered into a contract involving some sixteen thousand dollars to put themselves at a disadvantage?

A. Well, now, I would not answer that question in the affirmative or otherwise, because at that time I had no knowledge of what the contract was going to involve or how long they were going to keep the engine.

Q. You mean to say now that this engine and crew was a disadvantage to Westinghouse, Church, Kerr & Co.?

A. I mean to say that Westinghouse, Church, Kerr & Co. operating that engine and crew necessitated a traffic organization which was an expense to Westinghouse, Church, Kerr & Co., and which would not have been required had the C. & O. Railway been in a position to function where it should have been.

Q. I understood you to say that, but do you say now that the net result, taking into consideration the fact that you got, yourself, an organization, was a disadvantage to Westinghouse, Church, Kerr & Co.?

A. I don't want to equivocate but I don't know that I would be able to answer that for the simple reason that I was transferred from there in December and I don't know what transpired after that time.

Q. Then, you can't say?

A. I can only say up to the time I was there from September 13th to the last of December.

Q. You got the engine along October 1st?

A. Yes, sir, October 1st.

Q. Do you mean to say that was a disadvantage, the net proposition was a disadvantage?

A. From a monetary standpoint it was—a financial standpoint, yes, sir. We had nothing to gain about it.

Q. Were you concerned from a monetary standpoint?

A. I was not.

Q. I am talking about your company?

A. It was not any financial gain to us.

Q. Didn't you want the stuff there?

A. Yes, sir, we wanted the stuff, but so far as involving any saving of money was concerned or the expenditure of money, that didn't cut any ice.

Q. I am leaving out the expenditure of money. What you wanted was the stuff?

A. We certainly did.

[fol. 73] Q. You don't mean that this arrangement was not an advantage to your company in getting stuff there promptly?

A. It was an advantage, but, if the C. & O. had functioned properly, it would not have been necessary.

Q. As conditions then existed it was an advantage, was it not?

A. Under the conditions existing, perhaps, yes.

Q. Weren't those conditions abnormal?

A. All the conditions were abnormal.

Q. Then, certainly those were?

A. Well, yes. The necessity of building the camp was an abnormal condition.

Q. Didn't the government pay for these traffic people?

A. The government paid all the bills that were incurred, paid all the bills for all the material and all the people on the job as far as I know.

Q. Then, they paid for this extra traffic force that you say cost you something?

Mr. Anderson: I think the contract in evidence of what the government had to pay is the best evidence.

Mr. D. H. Leake: He said he had to pay them.

Witness: I didn't have to pay them. Our company paid the bills and the government authorized their payment and reimbursed them. I don't know anything of the terms of the contract.

By Mr. D. H. Leake:

Q. You don't mean to say that you didn't get service that you could not have possibly gotten without this engine and crew under the conditions as then existing?

A. I certainly do say that we did not get the service which the railroad company should have given.

Q. Do you think that answers my question?

A. Well, I think it answers it the best I can. State it over again.

Q. I said you do not mean to say that, under the conditions as existing this arrangement did not enable you to get better service in the delivery of stuff at these two camps than you could have gotten otherwise?

A. Admitting so, I can say yes or no, but, if I say yes to that, it would be partly right and partly wrong. In benefitting us we benefitted the railroad just as much as we benefitted ourselves. We cleared their tracks, otherwise there would have been embargoes put [fol. 74] on, which would have prevented us getting any material. I don't know whether I have answered it the way you want. I answered it the way I see it.

Q. I will ask you again, didn't that exclusive use, which your company had of this engine and crew both day and night, with the arrangement for its use which you made with the company, enable you to get better service in the delivery of your stuff at the camps than you could possibly have gotten otherwise under the conditions that then existed?

A. Well, certainly, because we were getting no service at all under the conditions that existed. I say none at all; I will say that we were not getting service or half way service.

Q. Then, you got better?

A. Certainly, we were getting better service.

Q. Didn't that enable you to get the service that could not have been gotten except with the use of a special engine and crew?

A. I wouldn't say that. I wouldn't say that at all.

Q. Is it a fact or not?

A. I don't know whether it is a fact or not. We didn't get the service. I couldn't say what conditions were with the C. & O. as to whether they were in a position to better their service to us or not.

Q. I said under the conditions as then existed and I predicated my question on that.

A. But the condition as then existing with the C. & O. was such that it would not have made any difference whether war was on or not; if they had had any congestion, it would have been the same fix; they were all shot to pieces. I don't know whether they could have performed under those conditions or not.

Q. You mean to say that the use by your company of an engine and crew, also train crew such as brakemen and conductor, the exclusive use of those men, was not a tremendous advantage to your concern?

A. Certainly it was.

Q. You don't mean to say that you are entitled to that sort of service, anyway, do you?

A. We were entitled to reasonable service that would not have necessitated that. I am only telling you what ordinary railroad service would have given.

Q. You know this much, that ordinary service don't give any shipper the exclusive use of an engine and crew?

A. I have seen jobs where the railroad company did place an engine at the disposal of the job without any charge.

[fol. 75] NOTE.—Question repeated to witness.

A. (Continued.) I don't know that ordinary railroad service does, but I have seen the time with jobs where we had the use of an engine, you may say, almost exclusively; it was not probably assigned for that particular exclusive use night and day.

Q. But this one was, wasn't it?

A. Yes.

Q. You stated you didn't know how much (I think you did) of that work was shifting on the yard, respotting, do you?

Witness: Do you mean respotting in our tracks or in the C. & O. yards?

Mr. D. H. Leake: Anywhere.

A. Most of the time in the day time the engine made up and got out of convenient tracks on the C. & O. yards cars so that they could be delivered to the various yards at night, and they also made one or two switches in the morning, but most of the daylight time

use of that engine was primarily devoted to arranging and getting cars out from the various side tracks on the C. & O. yards and putting them on certain tracks in the yards (if I had that map here I could show you), so that we could get them and arrange them to go to the various cantonments; but a large percentage of our shipping was done at night when we could have better access to the running tracks of the C. & O.

By the Court:

Q. What was used to move these cars from one place to another?

A. The engine. They had a night and day crew on the engine.

Q. What was used to move the cars from the place where they were deposited in the day time to places where you wanted them at night?

A. This locomotive.

Q. Was that respotting or not?

A. No, sir.

Q. Was it the duty of the railroad company to put them at one place on the line and then take them to another place?

A. It was the duty of the railroad company to have put these cars on our siding and have arranged them on the classification yards so that they could have put them on our sidings with their own locomotives as we directed.

[fol. 76] Q. They had to spot them twice?

A. No, sir, but they would take them into the receiving yard, over the hump, and classified them, and in doing all that all the cars for us would be arranged on certain tracks so that they could be gotten at by their engine instead of having to dig out a car here and there.

Q. You don't understand me. I understood you to say a while ago that the engine was used to pick out cars after they were once placed on the siding for you, and they were carried at night to wherever you wanted them on your private yard?

A. No. The sidings I spoke of were side tracks in the C. & O. yard which were used merely as classification tracks. They were not put on our sidings and then respotting. They were taken out from the C. & O. yards and put on certain tracks which would enable our engine to handle them with greater ease and not have to cross running tracks, because some of the sidings were on the other side of the running tracks and we were not always able to get across those tracks.

Q. What did you use in this yard to take cars from one place to another?

A. We didn't have to respot in our own yards, very little respotting in our own yards. When cars came in they were spotted approximately where we wanted them. They were unloaded so quickly we didn't have to respot them.

By Mr. D. H. Leake:

Q. Didn't you testify on examination in chief that you did respot them?

A. We did respot some; for instance, some would come at Camp Stuart and we would find we needed the material at Camp Hill or at the brewery, and that was the most convenient place to get it, and we would take a car out of there and take it up. There was very little of that done.

Q. This engine did not enable you to do that?

A. The C. & O. would have done it.

Q. You would have to have paid them for it, wouldn't you?

A. Yes, sir. We did do that for a time. We had made arrangement before October 1st to have two or three cars, or several cars, spotted up there, that is, taken up to the brewery, but there was a switching charge and that was a perfectly right charge to make.

Q. Wasn't there a lot of switching necessary around in your own yard?

A. No, there was not, because the cars would be unloaded, and the [fol. 77] only shifting would be the same shifting that any railroad company would give us; in other words, it was a line of cars on the track, and at this end those cars were unloaded and they were loaded ones down here. The only shifting would be shifting out these empty cars and putting back the loaded ones. That was a function which the railroad company would have given, themselves.

Q. You don't mean to say that your company tricked the railroad company into making a contract whereby you agreed to pay for something that you didn't think you had to pay for?

A. I don't say anything of the kind. I don't think they tried to trick the railroad company into anything. As far as I know the only object in getting the engine was to get service which the C. & O. Railway Company couldn't give us and which they should have given us.

Q. But on account of the then existing conditions?

A. Certainly. The then existing conditions brought the whole thing about.

By the Court:

Q. How long did you say you were with the defendant company? You came there in September?

A. I was there from September 13th until the end of December, when I was transferred to another job at Muscle Shoals, Alabama.

Q. You went there when?

A. On September 13th, 1917, and I left there on the 27th or 28th—27th of December I was transferred to another place.

Q. The 27th of December you left there?

A. 1917, yes, sir. At that time the peak of the car movement had been practically reached.

By Mr. D. H. Leake:

Q. Wasn't it worth a great deal to have this engine available to you at any time for any service you wanted, such as shifting in your yard, shifting between various cantonments and going into

the yard and picking out cars that you wanted especially at any time? Wasn't that worth a great deal?

A. Why, certainly, it would have been worth a great deal to anybody under those conditions, or under any conditions, there is no question about that.

Witness stood aside.

A. G. QUARLES, a witness on behalf of the defendant, being first duly sworn, testified as follows:

[fol. 78] Examination-in-chief.

By Mr. Marks:

Q. By whom are you employed now?

A. Just at present I am not employed at all. Last work I did was for Dwight P. Robinson & Co., of Chicago. Originally I was with Westinghouse, Church, Kerr & Co.

Q. When did you leave the employ of Dwight P. Robinson & Co.?

A. I left Chicago the 22nd of October.

Q. You are living in Richmond now at your home?

A. Yes, sir.

Q. Were you in the employ of Westinghouse, Church, Kerr & Co. in 1917 and '18, during the operations at Newport News?

A. Yes, sir.

Q. Were you ever in the employ of the C. & O. Railway?

A. For twenty-eight and a half years.

Q. In what capacity, or capacities?

A. I was first apprentice boy in the shop, building cars; then I was brakeman, and I ran a train for four years, and I fired for one year, and I was yard master for seventeen years.

Q. Yard master seventeen years?

A. Yes, sir.

Q. Where were you yard master, at what point?

A. I was yard master at 17th street, what is known as the 17th street yard, including Broad Street Station. I was yard master and station master at the same time. Then, I was general yard master of all the yards in Richmond later on.

Q. Your experience has been such as to inform you fully as to railroad operations and practice, has it not?

A. I think so.

Q. Mr. Quarles, reference has been made by counsel to yards of Westinghouse, Church, Kerr & Co. at Newport News. Did the Westinghouse, Church, Kerr Co. have any yards of its own?

A. No, sir.

Q. What was the nature of the tracks upon which their cars were placed for unloading?

A. They had two unloading tracks at Camp Stuart. They were the main tracks that they had there. Later on, on the completion of the cantonments, they had more tracks put in around the hospital

and different places, but the bulk of the work was done on those two tracks leading from the main line to the delivery point on the C. & O. up in Camp Stuart.

[fol. 79] Q. Were those tracks so constructed that you could shift back and forth on them and change cars from one location to another?

A. Yes, you could do that. We had a switch at this end that you could take cars off one track and put on there, or vice versa as the case might be.

Q. What was your position at Newport News with Westinghouse, Church, Kerr Co.?

A. I was yard master for them, I had charge of everything out in the yard.

Q. Please state to the court your knowledge of the circumstances pertaining to this engine and its use from the time you were employed down there until the work was completed and the engine released?

A. Well, as to the engine which was assigned to Westinghouse, Church, Kerr & Co., I took charge of it with a C. & O. crew——

Q. When did you first go there?

A. I went there I think, as well as I recollect, about September 17th.

Q. Of what year?

A. 1917.

Q. What did you do when you first went there in the employ of the company?

A. About the third or fourth day after I was there—the first two days I was there—I was using some trucks, went to Norfolk after some freight from the Old Dominion, but on the following Monday I was put out on the yard with eight men.

Q. You mean out on the C. & O. yards?

A. Yes, sir. Two of those men were stationed at N.Y. Cabin in the day and two at night, two down at 28th street yard, west end of 28th street yard, one day and night, and two down at the float where cars are received from Norfolk by way of floats. The duty of those men was to check up the bills on incoming trains and floors, and all cars consigned to Westinghouse, Church, Kerr & Co. were tagged for Westinghouse, Church, Kerr & Co. with a tag or placard about that size. (Indicating.) Wherever that card was seen by the C. & O. yard men they would know that the car belonged to Westinghouse, Church, Kerr & Co. and on what siding it was intended to be placed. After being out there several days and working with the C. & O. yard men in order to get the material over, I found that we were not getting anywhere, we were not getting the material, it was impossible for the service to be performed as necessary to the amount of men that we employed to unload that material and to work it up as it was unloaded, and I stated to our traffic manager, Mr. Smith, "I don't see but one way out of this; that will be for the C. & O. to assign us a special engine for my use entirely to handle our freight." Mr. Smith said he thought that

was a good idea, and in a day or two he had me go down to Mr. Ford's office to talk it over with Mr. Ford about the engine. Mr. Ford first thought that probably — be a bad idea, but, having had the experience that I had had in yard work, I was able to convince him that the engine would not only be of great service to the building of these cantonments but would be of service to the C. & O. Railway Co. in that it would do work that it was impossible for him to do; so he said "I will let you know," and we left the office, and then I don't know anything about any other arrangement that was made after that except, that I know we received the engine in a day or two afterwards.

Q. Why was it necessary originally to place these eight men at the different points on the yard that you have described, with you supervising them, to locate and tag those cars?

A. Well, the idea was that the general condition of the Newport News yard was such that they didn't keep up, they didn't keep track of the cars coming in for Westinghouse, Church, Kerr & Co. It seemed that they had boys employed to take track lists every day, but those track lists were incorrect. The C. & O. men, themselves, were unable to locate cars by those track lists, and our material was scattered from the west end of the receiving yard down to the pier yard, that is, down to the river, and some of those cars had been in there since long before I got there, and some of them stayed in there for possibly two months after I got there before we could ever get to them, owing to the fact that cars were coming in all the time and it was impossible to get them to switch them out, and I couldn't do it with the engine that I had and it was some time before we could really get to them.

Q. Just go ahead and take up at the point you left off and state what you did with the engine and the service it performed?

A. The service I performed with the engine was that I would switch around the yard all during the day and gather up all the cars that I could possibly get to owing to the delay that we would have by out-going trains. The yard at Newport News is very poorly constructed and they have had to work at disadvantage there for all [fol. 81] these years owing to that fact, on account of it being a very long yard and very narrow, there are points that, when a train is pulling out of Newport News, a coal train, we will say, with 75 or 80 cars as the case was then, up to 100 cars, everything stood still while that train was pulling out, nobody could work, nobody could get on the main line.

By the Court:

Q. You mean empties?

A. Yes, sir. Empties all left from 28th street yard and loads all came in at the receiving yard and all passed through that little neck between the 28th street yard and the classification yard, which made it necessary, whenever a train of empties was pulling out, other engines all stood still as well as the ones we had, and we got a good many delays that way, and they would get an engine in the east end of the classification yard where I was working—

Q. Was there any difference between your company and any other company down there?

A. Absolutely none.

Q. Everybody had the same condition?

A. Everybody had the same condition; everybody had practically the same right. The first man that got to the switch was the man that did the work, and the others stood still until he got through, and those were the conditions that tied up Newport News; those were the conditions that tied us up, those were the conditions that kept us on the go from there to the camp in the first place without having to put on this additional engine. Then I would get these cars together and then I would go down to the yard master's office, and I would stay down there until nine o'clock every night and sometimes later, but never earlier than nine o'clock; then I would give instructions, I would write out a memorandum to the night yard master and keep a carbon copy of it, myself, give to him just what instructions we wanted done at the camp that night. Then he would handle it from that time on (the C. & O. yard master) and they would send an engine over to the camp and couple up to those two tracks of empties and bring them all over into the C. & O. yard and then classify them, putting box cars in one track and coal cars in another track, and, if any of them were crippled, switch out the bad order cars and put them in another track. Then they would catch hold of this cut of material that I had gotten together during the day and take it over and place it as instructed by me. I [fol. 82] would give them instructions as to where we wanted these cars placed and how we wanted them placed, I had a man that I kept there for the purpose; he went over there to see that these cars were properly placed.

By Mr. Marks:

Q. Mr. Quarles, did you use this engine in switching out cars on the various storage tracks where the C. & O. had put them rather than deliver them?

A. I switched out cars from every track I think in Newport News yard. I don't know of any track in the yard, of all the tracks that they had, that at some time I did not get some cars off of.

Q. Did you switch cars from the classification yard of the C. & O.?

A. Yes.

Q. Did you switch them from the receiving yard?

A. Yes. I went up after a train sometimes stayed there for two days, maybe three days, without having been broken up at all; the C. & O. hadn't been able to get to it. I would go over to the west end of the receiving yard and probably handle 60 or 75 cars in order to get out what material we had in that train that we were waiting for in the camp.

Q. How much of this service that you performed with the engine would have been performed by the C. & O. Railway under the regular freight rates paid on the cars if the engine had not been assigned?

A. Well, to my knowledge I did not do any work with the engine that really should not have been performed by the C. & O. Railway Company under general conditions. I don't recall anything at all in switching that we did for ourselves that would not or should not have been done by the company under its general rules.

Q. Were you operating yard master of Westinghouse, Church, Kerr Co. under C & O. officials?

A. Yes, sir.

Q. Did you take your directions and orders from them?

A. Not except as to the government of general rules. Of course we had to conform to the rules of the C. & O. Railway, that is, so far as trains are concerned, and I could not use any tracks that would not be given me by the yard master. I could not do anything that would be contrary to the general working of the C. & O. Railway.

Q. Did the C. & O. Railway officials and the superintendent down [fol. 83] there know the character of the work that this engine was performing in the C. & O. yards?

A. Yes, sir.

Q. And at night when you left the yard, yourself, around nine o'clock, the engine was operated under the immediate direction of the C. & O. yard master?

A. Yes, sir.

Q. Mr. Quarles, how much switching was there on the Westinghouse cars between yards; that is, if you placed a car on Camp Stuart siding and you wanted to switch it back to Camp Hill, how much of that went on for which a special switching charge would have been made?

A. The percentage was very small. I couldn't tell you the exact number, but apparently there were about twenty or twenty-five cars as near as I can recollect now. They were very few cars in there went to Camp Stuart that were necessary to be switched to any other of the sidings for Westinghouse, Church, Kerr & Co., but occasionally there was a car that would go over to Camp Stuart that was needed at Camp Hill, and after it had gotten there the car would be ordered then back to Camp Hill; or probably there was a car that had gotten in at the brewery siding that would be needed either at Camp Stuart or Camp Hill, but there was a very small number of those cars and they entailed very little additional switching for this reason: If a car went into Camp Stuart with a regular cut and was not unloaded, when that engine went over at night and pulled those empties we pulled that car right back into the C. & O. yard with the empties, and, in switching and classifying those empties, we would drop that car out and then put it in with the cars that went to Camp Hill for the next day or at some other time.

Q. As I understand you it is your opinion that twenty-five cars would be the maximum number, the entire amount handled, which were spotted on one siding and then moved from that to another siding and spotting at the other place?

A. I would say that is very conservative.

Mr. D. H. Leake: We object to the question inasmuch as the witness hadn't stated that. He said 25 cars was the maximum number between the two camps as I understood.

Witness: I mean for all the sidings. I would say twenty-five was a very conservative number.

[fol. 84] By the Court:

Q. You are just guessing?

A. Well, I am guessing from actual service that I performed.

Q. Did you take any memorandum down?

A. Well, yes, I did take a memorandum of every car. Every car was placed in my book that was handled.

Q. Have you got that book?

A. No, sir. I am sorry to say I have not, but I took the number of every car, and from my general experience I think I am in a position to form a pretty good opinion as to approximately what would be the number. I don't think any of us can say unless we had our records. If we had all the records of the camp it would establish every car that was taken from either point and carried to the other as a second move.

Cross-examination.

By Mr. D. H. Leake:

Q. Mr. Quarles, didn't this engine and crew enable you to get stuff much more promptly than you could have gotten it otherwise?

A. We wouldn't have needed it otherwise than that.

Q. And you would not probably have made this contract to pay for it if that had not been true, would you?

A. I don't know anything about that contract.

Q. You did know something about it because you were present.

A. I only know what has been testified to here. I personally don't know anything about the contract that was made, as to any monthly consideration.

Q. You don't know what that contract was?

A. No, sir.

Q. And you were present at the interview leading up to that?

A. Yes, sir, I was.

Q. For instance, if I understand it, this engine would enable you to go into the receiving yard——

A. Yes, sir.

Q. And pick out cars that you would not otherwise have gotten until they had gone to the classification yard?

A. Sure.

Q. Under the regular routine of railroad operation?

A. Yes, sir.

[fol. 85] Q. Thereby getting those cars that much sooner?

A. Yes, sir.

Q. Wasn't it some advantage to your company to have the use of the engine and crew under the conditions that existed there at that time?

A. I don't think anybody would deny that. It certainly was.

Witness stood aside.

H. K. LOVE, a witness on behalf of the defendant, being first duly sworn, testified as follows:

Examination-in-chief.

By Mr. Marks:

Q. Major Love, where are you employed at present?

A. Dallas, Texas.

Q. What is the character of your work?

A. I am Field Examiner for the Veterans' Bureau.

Q. United States Government?

A. Yes, sir.

Q. What was your duty with the government during the period in question here?

A. I was Constructing Quartermaster at Newport News.

Q. Were you the government representative in charge of the construction which Westinghouse, Church, Kerr & Co. were doing at that time?

A. Yes, sir.

Q. Are you familiar with the general situation there?

A. Yes, sir.

Q. Suppose you just state in your own way the conditions which existed.

A. I will start at the very beginning and say that a committee was sent from Washington (a military committee) to Norfolk and to Newport News spying out the land for the location of a port of embarkation. Norfolk offered a thousand acres of land to the government free of rent during the war if they would locate this port in Norfolk. Newport News offered nothing of that sort, but the C. & O. Railway promised to build a spur from their existing sidings to the [fol. 86] edge of the Pulliam farm. The city of Newport News agreed to build a concrete road to connect the Pulliam farm with the proposed building north of the town, which afterwards became Camp Hill, and the Old Dominion Company (they owned practically everything there) agreed to rent to the government at five per cent on their valuation, plus taxation, such land as the government might require. Very well. That being so, for some reason or other the military government selected Newport News as the port of embarkation. I was sent there the 30th day of July. I am quite sure it was on a Sunday I reported there, and Mr. Bowie and others of the Westinghouse people came at the same time. Monday morning work began on Camp Stuart, and the first thing built was little

shack, an employment office. My first duty was a visit to Mr. Ford to try to get this spur put in. He referred me to the Mayor of the town; that they couldn't do anything until the city guaranteed them against damages for the necessary right of way. I went to the Mayor and he referred me to the City Attorney. The City Attorney promised an early meeting of the Council, and that the spur should be built. In the meantime our cars were already there and coming in in regular flocks, and we were under the necessity—

By the Court:

Q. What do you mean by "our cars?"

A. I mean the government cars. If the court please, the Westinghouse contract was a cost-plus contract.

Q. You mean Westinghouse cars were coming in?

A. Yes, sir. I mean by that cars that they have ordered and cars that were being ordered by Washington, by the Construction Division in Washington, ordering material into Newport News. We were supposed to have that camp completed—at that time the limit was the first day of November—to receive troops. Very well. We began by hiring all sorts of wagons and anything in the shape of a team or wagon at \$7.50 a day to haul material to Camp Stuart from the various sidings on the C. & O., because the Chesapeake & Ohio had said that they would not get it in or could not get the spur in until the first day of September. Even after that nothing was done, so I went to General Hutchinson. He got, I think, the General Manager, or several officials, anyway, from Richmond to come down there and promised faithfully to get it in by the first of September if not before. The result was, as a matter of fact, if the Westinghouse people had not demolished the building which stood in the [fol. 87] right of way and which the government had to pay for, there probably would have been another ten days' delay because the owner said it would take him ten days to move that building; but, as it was, the first car load of lumber landed in Camp Stuart the first day of September. In the meantime, of course, the yards were filled up with cars for all the government needs there, the military strictly as well as construction men; and so it ran along until it had just arrived at a hopeless stage; that was all there was to it. I would appeal to Mr. Ford—a splendid gentleman always, most anxious and willing—but "I can't do anything; I am short of office force; I am short of men in the field; I am up against it." That was the substance of what I would get from him. Then I would call on Gen. Hutchinson, who had more persuasive power, to call on Mr. Ford, and at all times he was perfectly willing to do what he could do, but he couldn't do. The result was that I did not know at first that this engine was on the job, but in a very short time I did know, and I took it for granted that the C. & O. Railway had furnished it. I realized at the time that the whole thing was costing the government a great deal of money that the government was not properly entitled to pay, aside, of course, from the engine, itself. I hadn't any idea at all that we were paying or that there was any

claim to be made by the C. & O. for that engine or crew, though I realized how absolutely necessary, and how the terminal charges that we were paying should have covered everything that we were doing, practically everything. We may have switched 20 or 25 cars at different times, but very, very few, and I can give a reason for that. We borrowed a great many automobile trucks from Gen Hutchinson and on some occasions, of course, there would be material in Camp Stuart that we could use to advantage along the warehouses we were building along Virginia Avenue and up at Camp Hill, and those big army trucks would do that rehandling. A few times I don't doubt but what a car, itself, would be shifted up, but on the other hand, we were doing a world of work every day saving the C. & O. money in work that they would otherwise have to do in making up their empties and cutting out their trains and drilling the cars, that we were doing not only for ourselves but for others. To illustrate that, Gen. Hutchinson very shortly afterwards, and even at that time, had at least one and I think two or three government engines there and had them there through the entire peak of the work, all government-owned engines, government-operated engines, whereas we could not get that kind of engine; but what I mean is that the government was contributing in that way, standing the expense in that way, expense that would properly be chargeable against the Chesapeake & Ohio. The matter ran along in that way until about the time the Westinghouse people were through with the contract, and there was always at that time a cleaning up, of course, of accumulated claims. Under the rule the contractor was supposed to pay every claim that he obligated himself to, and when he received the receipt of the payee he would accompany his bill and send it to my office. That was the theory and of course that happened ninety-eight times out of a hundred; but there were many questionable charges in a matter like that, and we naturally grew into the habit of consulting each other; Mr. Bowie, for instance, if he questioned this bill or that, would come into my office, or I would go into his office, and when the money was paid out he would know whether he was going to be reimbursed for it. Just so when these bills came up, he came in. Of course, I can't undertake to quote him, but the idea was that here were some bills—

Mr. D. H. Leake: Are you quoting somebody?

Witness: No, sir, I couldn't undertake to.

The Court: He is telling what Mr. Bowie said.

M. D. H. Leake: I object to it.

The Court: Go ahead, sir. We want to know what occurred, not what Mr. Bowie said.

A. (continued). I was going to repeat substantially the conversation with Mr. Bowie who brought these claims to me.

The Court: We want to know what you did after conferring with him.

A. (continued). As far as I was concerned I said that I would not pay them because I considered it a thoroughly unrighteous

claim, and there the matter rested. Well, Mr. Bowie, however, sent down to Alabama and brought Mr. Smith up who knew more about the details than any one else, and he made out a very lengthy report that is in the files. Mr. Bowie left about this time and Mr. Van Gelder came down at one time, at least on various matters, but this was one. I had at least one interview with Mr. Ford, in which—Shall I say?

The Court: Anything that occurred between Mr. Ford and yourself.

[fol. 89] A. (continued). I objected to payment of the bills. I said that I would not pay the bills and I gave my reasons. I had several reasons. One of them of course was that I claimed that we had earned the locomotive, if for no other reason, several times over in work done for the Chesapeake & Ohio outside of the mere spotting of our cars. Mr. Ford never denied that. He may not have believed it but he never denied it. There was no argument over it at that time or any time. He finally wanted to split it—

Mr. Anderson: Just leave out any reference to compromise negotiations.

A. (continued). The upshot was that I refused to pay. I might say that on a cost-plus contract such as the one we were operating under it was money in the contractor's pocket every time he was inefficient, every time there was loss of time on the work, and, if I paid this bill they would have received their commission; they would have made money by my paying that bill.

By Mr. Anderson:

Q. You mean Westinghouse, Church, Kerr & Co.?

A. Yes, sir.

Mr. D. H. Leake: For the purposes of the record I want to save the objection to any evidence of the witness concerning his contract, or the contract that the government had with Westinghouse, Church, Kerr & Co., and ask the court to exclude it.

The Court: I will continue the motion. Same ruling.

Mr. D. H. Leake: I also ask Your Honor to exclude the witness' opinion as to the justice of the bill. He said in his opinion—

The Court: I sustain that; that is stricken out of the record.

Cross-examination:

By Mr. D. H. Leake:

Q. Now, Major, when you said that the transportation service covered the service given by this engine, you didn't mean to say that the transportation service gives to a shipper the exclusive use of an engine and crew, do you?

A. I didn't say that.

[fol. 90] Q. Doesn't that fact, that a shipper has the exclusive use of an engine and crew, enable him, under any conditions, particularly under the conditions that existed there, to get service that he could not possibly get otherwise?

Witness: Isn't that a matter of opinion? Shall I answer that?

Mr. D. H. Leake: I am asking you as a matter of fact, didn't that enable him to get service?

Witness: Under the conditions there?

Mr. D. H. Leake: Yes, sir.

A. Certainly.

Q. That he could not have gotten otherwise?

A. I will not say that way, because, if the Chesapeake & Ohio had changed those conditions by rendering the service they otherwise would have done there, a condition would not have existed.

Q. Was there any way in the world they could change the conditions, which were abnormal due to the abnormality of the times? All the country was in a state of war and the whole transportation systems were largely upset, weren't they?

A. I am not capable of answering that but I can say this: The Chesapeake & Ohio and the Old Dominion and the City of Newport News represented undoubtedly that they could function and tried to get the government to select their point and they certainly should not have made that promise.

Q. I understand what the C. & O. promised to do they did. They promised to give a track. Didn't they do that?

A. They promised to function, of course.

Witness stood aside.

H. M. VAN GELDER, a witness on behalf of the defendant, being first duly sworn, testified as follows:

Examination-in-chief.

By Mr. Marks:

Q. You were with Westinghouse, Church, Kerr & Co., the defendant in this case?

A. Yes, sir.

Q. Were you with them during the war?

A. Yes, sir, I was.

[fol. 91] Q. What was your duty with the company at that time?

A. I had the title of managing engineer.

Q. Just state in your own way the circumstances pertaining to this litigation.

The Court: Were you down at Newport News between September 17th and December 29th, 1917?

Witness: Yes.

The Court: Go ahead.

A. I went to Newport News with Major Love and Mr. Bowie immediately after the contract was made. I was located in Washington most of the time; that was my real location, at Washington and New York. I went to Newport News the last of July when this job was started, and then I went there perhaps once in a week or once in two weeks all the rest of the time the next year. It was my duty to correlate matters between the government construction department at Washington and our work at Newport News and in performing that function I went back and forth between Washington and Newport News, although I spent most of my time in Washington. I was familiar with the contract; I helped to make the contract, and I was familiar with the work, conduct of the work, in Newport News, and features of it would come up to me, particularly features that were concerned with the Washington department. Then towards the end of the job when it was being cleaned up, I was cleaning up with my own matters the billing and accounting, clearing up the various expenses, and I held conferences and analyzed problems and discussed all various matters.

Mr. Marks: Go ahead and tell anything you know about this engine situation.

A. continued). I knew about the general freight situation and general freight conditions of Newport News from the beginning of the job. I knew of the difficulty in getting material delivered and knew of the congestion. I didn't go into details. Of course, I saw—For instance, I could say of my own knowledge that the C. & O. during September delivered cars on our sidings because I saw the cars being delivered. This immediate question of hiring the locomotive did not come up to me at the time, as it was just one of the detail matters that Mr. Bowie, having charge of the [fol. 92] work, would handle. I heard nothing about it until during the winter of 1918. The question then came up about the bills, the in the spring I got into it rather actively in the discussion of the bills and the settlement of the same and the question of the propriety of the bills, and reviewed the matters. At the time I didn't go into details; at the time the engines were in use I didn't know in detail what they were doing.

By Mr. Marks:

Q. What took place at the conclusion of this matter when you were there at Newport News?

Mr. Anderson: Omit any reference to any compromise if any.

A. I think it was in May the first time that I actively took this matter up and made diligent inquiry into the question of the use of the switch engine and what had been done and the propriety of the matter, and then in July I caused a conference to be held with Mr. Ford, at which Mr. Kyle and our then man in charge of the work after Mr. Bowie had left (Mr. Ackerman) and Major Love were present along with myself. This conference was for

the purpose of discussing the situation and presenting our viewpoint and the others presenting their viewpoint, and at that conference I presented our case, you might say, to Mr. Ford and stated our attitude on the matter, which I confirmed immediately by writing a letter to Mr. Ford of the C. & O., stating why we did not feel that we should pay the bills because of conditions that had occurred in the yards—the absolute lack of delivery of cars, which I found necessitated our obtaining this engine in order to do the work which the C. & O. didn't do. I have heard the testimony here of the conditions and the question of our obtaining these cars to advantage and all that. Of course, it is a fact that the C. & O. could have done just what we did. I am familiar with railroad work, I might say. I am not a terminal railroad man, but I studied railroad work a great deal and am engaged at the present time in railroad terminal work, and the C. & O. could have done just what we did; therefore I decided that we were not justified in paying the bills, because we performed the function, which I was satisfied they should have performed under the tariff as part of the terminal work, the exception of a small amount as has been testified. I realized there was a small amount of this switching as has been testified.

[fol. 93] Cross-examination.

By Mr. D. H. Leake:

Q. In reference to those conditions, you derived what information you had in regard thereto from others, did you not?

A. Not entirely. No. I went over the yard, myself. I saw the condition of the yards, not every day but frequently I saw the yards congested. I saw the main tracks—I know of my own knowledge that, when the main line tracks are filled with freight cars standing and no engine on them, it is a pretty serious situation. I saw that down there at times.

Q. You were not there when the contract was made?

Witness: You mean that day when the letter was written?

Q. Were you consulted before the contract was made?

Witness: What contract are you speaking of?

Mr. D. H. Leake: With the C. & O.—this letter.

A. No.

Q. So, you don't know the conditions which led up immediately to the making of the contract, or the writing of the letter, which was confirmed by a subsequent letter that Mr. Ford wrote your company?

A. Yes, I know of the conditions.

Q. And the circumstances leading up to the making of the contract?

A. Not specifically leading up to that letter at that day.

Q. What was done through the instrumentality of this engine and crew could, you say, have been done by the railway company?

A. Yes.

The Court: I understood him to say it ought to have been done.

By Mr. D. H. Leake:

Q. Ought to have been done by the railroad company?

A. I think I said it could have been done. It ought to have been done, too; I will say both.

By the Court:

Q. I understood you to say that it ought to have been done; that you did no more with this engine, I understood you to say, than the railroad company ought to have done for your company in delivering this freight?

A. That is correct, and I also said I thought the railroad company could have done it. I said both.

[fol. 94] By Mr. D. H. Leake:

Q. You don't mean to say that the railroad company ought to furnish you and your company a special engine, a special engineer and fireman and a special crew of brakemen and conductor?

A. I didn't say that.

Q. That is the service they did furnish you, isn't it?

A. No. I said that the work that was done by the engine ought to have been done by the railroad company and could have been done by them.

Q. The work, of course, could have been done by the railway company and they could have done it without charging you anything for the engine and crew?

A. Yes.

Q. And, of course, they could have done the same because it was their engine?

A. I am speaking in this case of what they were able to do. They would have been just as able to have performed the function of delivering these cars as we were. I introduced that by saying I heard a lot of testimony that it was an unusual condition and it could not be done.

Q. But they could not have performed the same service which they did perform for you unless they had assigned you what they did, a special engine and crew, could they?

A. Yes, they could have without assigning us a special engine and crew.

Q. And done the same service and done it as promptly?

A. Yes, sir, with their switch engine.

Q. Then, what was the idea of your company in getting an engine and crew if it was not of any use to you?

A. Because they didn't do it. I said they could have done it in my opinion.

Q. You mean to say that they could have done it in view of the congestion that was there at that time?

A. Why, yes, they could have done it the same as we did.

Q. But you had a special engine and crew?

A. But they had half a dozen engines, had thirty-two.

Q. You know very well their engines and crews as a rule are not devoted exclusively to one shipper?

A. I don't get your point exactly.

Q. Here is my point: You don't think you could have gotten the same service, where that engine and crew performed service for all shippers, that you got when they assigned to you the full and exclusive use of the engine and crew such as I have described? [fol. 95] A. Practically the same service. Just delivered cars, that is all we did. Yes, they could have given us the same service.

Q. It has been testified that this engine would go into the receiving yard before the cars were classified and picked out the cars that were for you and take them to the yard before they received classification.

A. It is testified they classified them.

Q. It has been testified they went into the receiving yard and got these cars.

A. My understanding was they went in and put them over the hump sometimes. They can't pick cars out.

Q. Assuming that to be a fact, that they did go into the receiving yard before they had ever been classified, drill out your stuff and switched it out, isn't that a service you would not have gotten but for that engine and crew?

A. We would have gotten it in a different way.

Q. Would you have gotten it?

A. That is a matter of opinion, just the way you take it. The normal way for a railroad to operate is to bring a train in and put it over the hump. That classifies it. It is a matter of a very few hours, not a matter of days.

Q. Let me read your letter: "Referring to our conversation, we believe the switching problem is getting so heavy on account of the work at the various sites, that it would be advisable for you to assign us an engine and crew on your basis." This is the letter of Westinghouse, Church, Kerr & Co., signed by Mr. Bowie. Do you mean to say he was making this proposition to get something that he would have gotten whether he made it or not?

A. No.

Q. Isn't it a fact he made the proposition to get some service he was not getting?

A. Yes, sir, but not that he shouldn't get it.

By the Court.

Q. Do I understand you to say that your freight should be given preference over other freight coming into the yard?

A. No, sir.

Q. I understand, by this engine being given you, you did get preference over other people shipping down to that terminal? Is that it or not?

A. We probably got some preference, not over everybody.

[fol. 96] Q. You got preference over everybody unless they had a special engine, didn't you?

A. No, sir, I think not.

Q. Explain why you didn't?

A. As I understand it, we, as a matter of fact, classified some of the trains, for instance. Now, if we classified any trains that would benefit every shipper just as much as it would ourselves up to that point. Then, starting from the point of classification, it is perfectly reasonable that the C. & O.—Of course, they were doing a lot of delivering. They would take classified cars to the Newport News Shipbuilding Company or to James Stuart or to someone else as they were taken to our camp, so I don't see that we necessarily would get a preference. That was not the object. Of course, the object of this was because the situation fell down. It was not a question of preference; it was a question of days and weeks of delay, and our only purpose was to expedite the work. We could—in fact, it was discussed; these questions have been discussed on that job and other jobs, whether we should just sit back and let matters take their course. It was not up to us to hound the railroad in every way we could to deliver the goods, but do the best we could in a normal way and then sit back and take it as it came. This being a government matter, we were all very much worked up over it. Gen. Hutchinson is a very active man, and this was an embarkation camp, and we looked upon it, and a great deal of our work in this camp and our activities were governed by purely patriotic motives in getting the camp ready for the men. There was no question of gain whatever, no question of personal advantage, and we were not trying to make a showing to the disadvantage of any other contractor; there was no such feeling as that. It was purely a question of getting this job done, and it was not a question of getting preference. I know of my own knowledge, I think, that we did not get the locomotive so that we could get preference, but it was to get the material delivered promptly. It got to a pass where we were not getting things for days. That was the general situation. The normal way a railroad operates is, when a train comes into the receiving yards, it is classified very soon as a usual thing, doesn't lie there days. That was the situation that occurred there.

By Mr. D. H. Leake:

Q. Wasn't that engine there an advantage to your company? [fol. 97] Wasn't the fact of your having the use of this engine and crew an advantage to your company under conditions which were existing there?

A. I can't say that it was an advantage. It was a method of expediting the work under the conditions that existed on the C. & O.; it was a method of expediting the work. I don't call it an advantage.

Mr. D. H. Leake: I don't want to quibble over words.

Witness: I don't want to quibble either; I am not quibbling, but there is a difference in meaning. There was no advantage to the company.

By Mr. Anderson:

Q. No financial advantage?

A. No, sir, and no advantage in reputation.

Mr. D. H. Leake: I don't care anything about financial advantage.

Witness: Well, what is advantage? I am trying to be exact in my terms, that is all. I don't see that it was of advantage to our company. It was an advantage to the government.

Mr. D. H. Leake: That is what I mean.

Witness: In getting the work done and expediting the work.

Witness stood aside.

H. K. LOVE, a witness on behalf of the defendant, being recalled, further testified as follows:

By Mr. Marks:

Q. Major Love, I understood you to say that this camp was located at Newport News, or at least, when the question of a site was being considered, the C. & O. Railway Co. and the city of Newport News and the Old Dominion Land Co. invited the location of the camp at Newport News, is that correct?

A. Yes, sir.

Q. So, then, if there were any unusual traffic conditions there on account of the embarkation camp, it would be due to a result of action upon the C. & O.'s express invitation?

Mr. D. H. Leake: I object.

The Court: Objection sustained.

Witness stood aside.

[fol. 98] Mr. Anderson: That is our case except the tariffs.

Mr. D. H. Leake: We have produced the tariff that these gentlemen asked us for. If they want to introduce it, it is all right.

A. P. HECKER, called as an adverse witness on behalf of the defendant, being first duly sworn, testified as follows:

Examination-in-chief.

By Mr. Marks:

Q. By whom are you employed?

A. Chesapeake & Ohio Railway Co.

Q. Are you familiar with the switching tariffs in effect on the C. & O. Railway from the 1st of October, 1917, to the last day of March, 1918?

A. Yes, sir.

Q. I hand you a tariff, which appears to be headed, "Rules and

Regulations Governing the Rates Named in this Tariff," and ask you if that rule and regulation which is marked was in effect at that time?

A. This rule here is a standard terminal rule that appears in all—

By the Court:

Q. What rule is that?

A. This is what we call a terminal rule.

Mr. D. H. Leake: Suppose you read it.

By Mr. Marks:

Q. This is a tariff on file with the Interstate Commerce Commission?

A. This tariff is not on file with the Interstate Commerce Commission, but it is a regular rule that is on file though.

By the Court:

Q. Is it sent out by the company?

A. It is on file with other publications of the Interstate Commerce Commission.

Q. That is what I mean. I mean is that a regulation laid down for the C. & O. Railroad and all railroads of that class?

A. This is the C. & O. Railway's rule for all terminal facilities, that is published in their tariffs, in all of their tariffs.

[fol. 99] Q. Under the United States statute?

A. Yes, sir.

By Mr. Marks:

Q. And on file with the Interstate Commerce Commission?

A. Yes, sir. This particular tariff is a Virginia tariff, but the same provision applies to the federal tariff.

Mr. Marks: We happen to have a book that is a local book.

By Mr. Anderson:

Q. That is the same provision on file with the Interstate Commerce Commission as to that also?

A. Yes, sir.

By Mr. Marks:

Q. It governs all switching operations done by the C. & O., both intrastate and interstate movements, as far as it applies?

A. So far as it applies.

The Court: That is a question of law. All he has to do is to prove the tariff. It is for me to determine what the law is.

Mr. Marks: We can just file that and let it be copied. Will you please file that, or a copy of that rule, as Exhibit A. P. H. #1?"

NOTE.—Copy of rule filed as follows:

"Rules and Regulations Governing the Rates Named in This Tariff

"Facilities, Privileges, and Deliveries.—The rates named herein apply from and to the tracks, stations or other receiving and delivering points on or to and from private sidings connected with lines parties to this tariff where the particular traffic is usually received or delivered, and also include the use of receiving and delivery facilities of such stations, or other receiving and delivering points, or private sidings, subject nevertheless to such charges (if any) for switching, [fol. 100] terminal service, storage, icing, demurrage, and all other charges and rules and regulations that may in anywise change, affect or determine any part, or the aggregate, of such rates, as well as any privileges, or facilities, granted or allowed as are, or shall be, published by any of the lines parties to this tariff, and any other charges for strictly local service or regulations incidental thereto, lawfully on file with the Interstate Commerce Commission on interstate traffic, or with the various state Commissions on intrastate traffic. The rates will also apply to and from such tracks, stations, or other receiving and delivering points, on or to and from private sidings connected with connecting lines not parties to this tariff, when and as designated and provided for in delivery tariffs published by any of the lines parties to this tariff, lawfully on file with the Interstate Commerce Commission on interstate traffic, or with the various state Commissions on intrastate traffic."

By Mr. Marks:

Q. This rule, which has been filed as Exhibit #1 with your testimony, covers the one placement of a car at a place where it is to be unloaded as a part of the freight rate?

A. Yes, sir.

Q. That is correct, is it?

A. That is the delivery.

Q. In other words, when a car goes into the Newport News terminal under this rule, which has been filed as an exhibit, the consignee would be entitled to have that car, whether interstate or intrastate, placed on the siding at which it was to be unloaded?

A. Yes.

Q. Free of any charge?

A. Yes.

Cross-examination.

By Mr. D. H. Leake:

Q. When cars are switched, after they have been placed as provided in the general tariff, is there not a particular tariff for switching service?

A. Yes, sir.

Q. Was there or not in 1917, in the fall of 1917 and 1918, such a tariff in effect at Newport News?

A. There was.

Q. Will you file that tariff or read into evidence the tariff pro-[fol. 101] visions and what was the charge for the switching service?

A. Item 88 of C. & O. tariff I. C. C. 5237, effective, interstate traffic, June 25th, 1912, intrastate traffic May 26th, 1912, provides on all carload freight between points within switching limits at Newport News and points within switching limits at Newport News a charge of four dollars per car. This item remained in effect until June 25th, 1918, when this charge was increased to five dollars per car under general order 28 of the Director General.

By Mr. Anderson:

Q. That only applies after a car has been once placed if it is desired to reswitch it? That applies after the car had been placed at the usual place of delivery, and then required a further switching?

A. Yes, sir.

Witness stood aside.

EXHIBIT E. I. F. No. 1—Omitted; printed side page 3 ante.

[fol. 102] EXHIBIT E. I. F. No. 2—Omitted; printed side page 3 ante.

EXHIBIT E. I. F. No. 3

The Chesapeake and Ohio Railway Co.

The Chesapeake and Ohio Railway Company of Indiana

Equipment Rentals

(Superseding All Previous Rates)

To all concerned:

The following charges will be made for the rental of equipment unless otherwise ordered: Equipment will be furnished only at the convenience of this company.

[fol. 103]

Locomotives

Type	Class	Per calendar day or fraction thereof, excluding crew and supplies
Small Engine	A, A-3, A-5, A-8, A-9, A-7, A-10, A-15, C-2, C-3, C-7, C-8, C-11, E-5, E-6	\$18.00
10-wheel Engine	F-1, F-2, F-7, F-8, F-9, F-10, F-11 and F-13	20.00
Small Consolidation ...	G-1, G-3, G-4, G-5, G-10 and G-12	22.50
Large Consolidation	G-6, G-7, G-8, G-9 and G-11	30.00
Atlantic Type	A-16	25.00
Pacific Type	F-15	35.00
Pacific Type	F-16 and F-17	40.00
Mikado and Mountain ..	K-1 and J-1	50.00
Mallet	H-1, H-2, H-3 and H-4 ...	50.00

Cars and Other Equipment (Without Crews)

Type	Charge per day
Freight Cars, (all classes) Caboose, Boarding Cars	\$1.00
Push Cars .....	.50
Small Steam Derrick (50 tons or over)	40.00
Steam Crane (less than 50 tons)	25.00
Steam Shovel	15.00 Minimum
Pile Driver	15.00 charge
Scale Testing Car	2.50 one day.
Snow Plow	25.00
Ledgerwood Unloader	10.00
Roadbed Spreader	5.00

Compute time of equipment, locomotive, etc., from the time it leaves the point it is located until time it is returned to such point, unless diverted in the interim to some other service, Sundays and Holidays included even if not used.

Rules for Applying Rates

1. These rates do not apply to interchange of equipment with other lines. Where such matters are not determined by the Per Diem and Car Service Rules, special instructions will be issued.

2. All labor including service of crew, supplies and materials furnished, and tools or parts lost or broken, will be billed on basis of actual cost, plus Twenty-five (25%) Per Cent.

3. The rates for cars and other equipment (exclusive of locomotives) are intended to include miscellaneous supplies for the equip-

ment, viz: oil, waste, fuel, etc., provided the equipment is being handled by our employees. If such equipment is turned over to outside party for protracted use, they will furnish their own supplies or pay for same as outlined (Rule 2).

4. If the equipment is furnished other than to connecting lines and under circumstances where no interests whatever of this Company are involved, these schedule rates may be increased to cover contingencies and a special rate determined by the merits of the case, Special rates may also be made to Bridge Companies, Contractors and others, for steam cranes to be used in erecting bridges, or in executing other Company work.

5. The party who leases the equipment will be expected to keep up the running repairs, the Railway Company to take care of the general repairs.

6. Bills for rental of locomotives and equipment used in clearing wrecks on other Companies lines, or either for performing such service as handling contractors' material outfits, etc., and do not leave our rails, should be rendered by the Superintendents. In all other instances they should furnish all necessary data to make bills for rental of locomotives to the Superintendent Motive Power, and for equipment other than locomotives, to the Chief Clerk Car Accounts. General Superintendent Transportation should be furnished copy of all data furnished Superintendent Motive Power and Chief Clerk Car Accounts for their use in rendering bills for equipment rentals.

J. R. Gould, Superintendent Motive Power. W. L. Booth,
General Superintendent Transportation. J. P. Stevens,
General Manager.

June 15, 1917.

[fol. 105]

EXHIBIT E. I. F. No. 5

The Chesapeake and Ohio Railway Co., Newport News Terminal
Division, E. I. Ford, Supt.

Newport News, Va., March 29th, 1918.

File #108-13

Mr. J. A. Thomas, Traffic Manager, Westinghouse, Church, Kerr &
Company, Newport News, Va.

DEAR SIR: Referring to your letter of March 28th, File 1892, 6-P, confirming our conversation a few days ago in which you advised that after Saturday, March 30th, you will not need the services of our switch engine.

My understanding is that you are winding up your work and there will be very few cars arriving for your Company. We will place such cars for you in the same manner that we make other local deliveries. The General Agent, Mr. L. C. Spengler, will notify you of the arrival of cars, and it will be necessary for you to notify Mr. Spengler in writing showing where you wish the cars placed, and Mr. Spengler will notify the Yard to place same. I would prefer that you do not give orders to the Yard direct as this might cause some confusion in the General Agent's Office.

Yours truly, E. I. Ford, Superintendent.

EXHIBIT J. F. S. No. 1

The Chesapeake and Ohio Railway Company

Richmond, Va., May 28, 1919.

Messrs. Westinghouse, Church, Kerr & Co., P. O. Box 848, Newport News, Va., to the Chesapeake and Ohio Railway Company, Dr.

[fol. 106] For services of engines and crews at Newport News, Va., as follows:

October 1917 Bill #437364	\$3,509.83	
November 1917 Bill 437366	3,766.31	
December 1917 Bill 437368	2,071.14	
		<u>\$9,347.28</u>
Less 15% Supervision Overcharged		711.28
		<u>\$8,636.00</u>
Less Lost Time 25 days		1,102.50
		<u>\$7,533.50</u>
January 1st, 1918		

STATE OF VIRGINIA,

City of Richmond, To wit:

I, Columbus A. Canepa, a Notary in and for the State and City aforesaid, do certify that J. W. Nokely this day personally appeared before me in my city aforesaid, and, being by me duly sworn, deposes and says that at the time the above services were performed he was the General Auditor of The Chesapeake and Ohio Railway Company, that the foregoing account is correct and due by Westinghouse, Church, Kerr & Company to The Chesapeake and Ohio Railway Company, and that no part of the same has been paid.

Given under my hand this 28th day of May, 1919.

Columbus A. Canepa, Notary Public.

X 21 Special

In remitting refer to Auditor's No. 437,364.
 Westinghouse, Church, Kerr & Company.
 P. O. Box 848, Newport News, Va.
 Recorded in April.

To United States Railroad Administration, Walker D. Hines, Directors General of Railroads, Operating Chesapeake and Ohio Railroad

[fol. 107] The above is to be regarded as substituted for the name of The Chesapeake and Ohio Railway Company, wherever the name appears in this document.

April, 1919.
 Dept. Bill No. —.

1917, December 28th.

For Service of Engine and Crew furnished during month of October, 1917:

Engineers, 616 hours @ 54½¢	\$335.72	
Firemen, 616 hours @ 31½¢	194.04	
Conductors, 371 hours @ 45¢	166.95	
Conductors, 245 hours @ 47½¢	116.38	
Brakemen, 742 hours @ 41½¢	307.93	
Brakemen, 490 hours @ 44¢	215.60	
Maintenance of Engines	41.79	
Coal Furnished, 134 tons @ 2.12	286.20	
Cylinder Oil, 12 gallons @ 38¢	4.56	
Signal Oil, 4¼ gallons @ 32¢	1.36	
Headlight Oil, 21 gallons @ 8¢	1.68	
Red cup grease, 3 lbs. @ 60¢	1.80	
Cotton Waste, 25 lbs. @ 12¼¢	3.06	
Water, 56,000 cu. ft. @ 8¢. per 100 cu. ft. ...	44.80	
	<hr/>	
	\$1,721.87	
Supervision 25%	430.46	
	<hr/>	
		\$2,152.33
For Rental of Engines No. 300, 24 days @ \$22.50	\$540.00	
For Rental of Engines No. 305, 3 days @ 22.50	67.50	
For Rental of Engines No. 306, 8 days @ 22.50	180.00	
For Rental of Engines No. 310, 4 days @ 22.50	90.00	
For Rental of Engines No. 390, 2 days @ 30.00	60.00	
For Rental of Engines No. 400, 3 days @ 30.00	90.00	

For Rental of Engines No. 485, 2 days @	
30.00	60.00
For Rental of Engines No. 508, 2 days @	
30.00	60.00
[fol. 108]	
For Rental of Engines No. 509, 2 days @	
30.00	60.00
For Rental of Engines No. 510, 3 days @	
30.00	90.00
For Rental of Engines No. 546, 2 days @	
30.00	60.00
	<hr/>
	\$1,357.50
	<hr/>
	\$3,509.83

N. News Terminal Division CREDIT			Examined and Registered :	Approved :
			L. B. ENSLOW	J. W. NOKELY
Trans.	378 F	\$1,008.57	Auditor of Disbursements	Asst. Federal Auditor
"	380 F	662.20		
"	382 F	357.75		
"	385 F	56.00	Auditor of Disbursements.	General Auditor.
"	386 F	7.95		
"	387 F	7.62		
M. of E.	308 F	52.24	Received,	10.....
Income	507 F	1,357.50	the sum of Three Thousand Five Hundred Nine	
		<hr/>	83/100 Dollars In full of the above account.	
		\$3,509.83		

X 21 Special

April, 1919.

In Remitting Refer to Auditor's No. 437,366.

Westinghouse, Church, Kerr & Company.

P. O. Box 848, Newport News, Va.

Recorded in Apr., 1919.

To United States Railroad Administration, Walker D. Hines, Director General of Railroads, Operating Chesapeake and Ohio Railroad

The above is to be regarded as substituted for the name of The Chesapeake and Ohio Railway Company, wherever the name appears in this document.

Dep't Bill No —.

1917, December 28th.

For service of Engine and Crew furnished during the month of November, 1917:

Engineers, 679 hours @ 54½¢.....	\$370.05	
Firemen, 679 hours @ 31½¢.....	213.88	
Conductors, 330½ hours @ 45¢.....	148.73	
[fol. 109]		
Conductors, 348½ hours @ 47½¢	165.54	
Brakemen, 661 hours @ 41½¢	274.31	
Brakemen, 697 hours @ 44¢	306.68	
Maintenance of Engines	61.64	
Coal Furnished, 150 tons @ \$2.12	318.00	
Cylinder Oil, 17 gallons @ 38¢	6.46	
Signal Oil, 4 gallons @ 32¢	1.28	
Headlight Oil, 22 gallons @ 8¢	1.76	
Red Cup Grease, 4 lbs. @ 60¢	2.40	
Cotton Waste, 32 lbs. @ 12½¢.....	3.92	
Water, 58,000 Cu. ft. @ 8¢ per 100 cu. ft...	46.40	
	<hr/>	
	\$1,921.05	
Supervision 25%	480.26	
	<hr/>	
		\$2,401.31
For Rental of Engine No. 300, 53 days @ \$22.50	\$1,192.50	
For Rental of Engine No. 308, 1 day @ 22.50	22.50	
For Rental of Engine No. 310, 4 days @ 22.50	90.00	
For Rental of Engine No. 507, 1 day @ 30.00	30.00	
For Rental of Engine No. 578, 1 day @ 30.00	30.00	
	<hr/>	
		\$1,365.00
		<hr/>
		\$3,766.31

N. News Terminal			Examined and Registered :		Approved :	
Division			L. B. ENSLOW		J. W. NOKEY	
CREDIT			Auditor of Disbursements		Asst. Federal	
Trans	378 F	\$1,119.07	Auditor of Disbursements.		General Auditor.	
"	380 F	729.91				
"	382 F	397.50				
"	385 F	58.00				
"	386 F	11.08				
"	387 F	8.70	Received, .....19.... the sum of Three Thousand, Seven Hundred Sixty-six—30-100 Dollars in full of the above ac- count.			
M. of E.	308 F	77.05				
Income	507 F	1,365.00				
		<hr/>				
		\$3,766.31				

[fol. 110]

X 21 Special

Apl. 1919.

In Remitting Refer to Auditor's No. 437,368.

Westinghouse, Church, Kerr & Company,

P. O. Box 848, Newport News, Va.

Recorded in April, 1919.

To United States Railroad Administration, Walker D. Hines, Director General of Railroads, Operating Chesapeake and Ohio Railroad

The above is to be regarded as substituted for the name of The Chesapeake and Ohio Railway Company, wherever the name appears in this document.

Dept't Bill No. —

1917, January 28th.

For service of Engine and Crew during the month of Dec., 1917:

Engineers, 349 hours @ 54½c.....	\$190.21
Firemen, 349 hours @ 31½c.....	109.93
Conductors, 158 hours @ 45c.....	71.10
Conductors, 191 hours @ 47½c.....	90.72
Brakemen, 316 hours @ 41½c.....	131.14
Brakemen, 382 hours @ 44c.....	168.08
Maintenance of Engines	97.24
Coal Furnished, 98 tons @ \$2.12.....	207.76
Valve Oil, 11⅝ gallons @ 48c.....	5.58
Car Oil, 12½ gallons @ 18c.....	2.25
D. J. Compound 20 pounds at 9½c.....	1.90
Red Cup Grease, 4 pounds @ 7½c.....	.30
Cotton Waste, 28 pounds @ 12½c.....	3.50
Water, 24,000 cu. ft. @ 8c. per 100 cu. ft...	19.20

 \$1,098.91

Supervision 25% 274.73

 \$1,373.64

For Rental of Engine No. 36, 2 days @ \$22.50 \$45.00

For Rental of Engine No. 300, 24 days @ 22.50 540.00

For Rental of Engine No. 306, 2 days @ 22.50 45.00

For Rental of Engine No. 308, 3 days @ 22.50 67.50

 \$697.50

[fol. 111]

 \$2,071.14

 \$2,071.14

N. News Terminal Division CREDIT			Examined and Registered:	Approved:
			L. B. ENSLOW Auditor of Disbursements	J. W. NOKELY Asst. Federal Auditor
Trans.	378 F	\$576.30		
"	380 F	375.18		
"	382 F	259.70		
"	385 F	24.00		
"	386 F	12.54		
"	387 F	4.36		
M. of E.	308 F	121.56		
Income	507 F	697.50		
		<u>\$2,071.14</u>		
			Received, .....19.... the sum of Two Thousand Seventy-one 14.100- Dollars in full of the above account.	

EXHIBIT J. F. S. No. 2

United States Railroad Administration, Walker D. Hines, Director
General Chesapeake and Ohio Railroad

Richmond, Va., May 28, 1919.

Messrs. Westinghouse, Church, Kerr & Co., P. O. Box 848, Newport
News Va., to Chesapeake and Ohio Railroad, Dr.

For services of engines and crews at Newport News, Va., as follows:

Jany. 1918—Bill #437370.....	\$2,826.01	
Feby. 1918—Bill 437372.....	2,035.36	
March, 1918—Bill 437374.....	1,955.15	
		<u>\$6,816.52</u>
Less 15% Supervision overcharged.....	521.89	
		<u>\$6,294.63</u>
Less lost time 12 days	529.20	
		<u>\$5,765.43</u>
March 29th, 1918		

[fol. 112] STATE OF VIRGINIA,

City of Richmond, To wit:

I, Columbus A. Canepa, a Notary Public in and for the State and City aforesaid, do certify that J. W. Nokely, this day personally appeared before me in my city aforesaid, and, being by me duly sworn, deposes and says that he is the Assistant Federal Auditor of the Chesapeake and Ohio Railroad, that the Foregoing account is correct and due by Westinghouse, Church, Kerr & Company to Chesapeake and Ohio Railroad, and that no part of the same has been paid.

Given under my hand this 28th day of May, 1919.

Columbus A. Canepa, Notary Public. My commission expires 2/20/1923.

X 21 Special

April, 1919.

Westinghouse, Church, Kerr & Company.

In Remitting Refer To Auditor's No. 437,370.

Recorded in Apl., 1919.

P. O. Box 848, Newport News, Va.

To United States Railroad Administration, Walker D. Hines,
Director General of Railroads, Operating Chesapeake and Ohio
Railroad

The above is to be regarded as substituted for the name of the
Chesapeake and Ohio Railway Company, wherever the name appears
in this document.

Dep't Bill No. —

1918, March 1st.

For service of Engine and Crew during the month of January,
1918:

Engineers, 511 hours @ 54½c.....	\$278.49	
Firemen, 511 hours @ 31½c.....	160.96	
Conductors, 329 hours @ 45c.....	148.05	
Conductors, 182 hours @ 47½c.....	86.45	
Brakemen, 658 hours @ 41½c.....	273.07	
Brakemen, 364 hours @ 44c.....	160.16	
[fol. 113] Maintenance of Engines.....	76.53	
Coal Furnished, 102 tons @ \$2.12.....	216.24	
Valve Oil, 13 gallons @ 48c.....	6.24	
Car Oil, 14 gallons @ 18c.....	2.52	
Rod Cup Grease, 6 pounds @ 7½c.....	.45	
Cotton Waste, 32 pounds @ 12½c.....	4.00	
Water, 24,570 cu. ft. @ 8 cents per 100 cu. ft.	19.65	
	<hr/>	
	\$1,432.81	
Supervision 25%	358.20	
	<hr/>	
		\$1,791.01
For Rental of Engine No. 36, 10 days @ \$22.50	\$225.00	
For Rental of Engine No. 300, 20 days @ 22.50	450.00	
For Rental of Engine No. 306, 4 days @ 22.50	90.00	
For Rental of Engine No. 308, 2 days @ 22.50	45.00	
For Rental of Engine No. 310, 10 days @ 22.50	225.00	
	<hr/>	
		\$1,035.00
		<hr/>
		\$2,826.01

N. News Terminal Division CREDIT			Examined and Registered: L. B. ENSLOW, Aud. of Disbursements.	Approved: J. W. NOKELY, Asst. Federal Auditor
Trans.	378 F	\$834.67		
"	390 F	549.30		
"	382 F	270.30		
"	385 F	24.56		
"	386 F	11.52		
"	387 F	5.00		
M. of E.	308 F	95.66		
Income	507 F	1,035.00		
\$2,826.01				
			Auditor of Disbursements.	General Auditor.
			Received, .....19....	
			the sum of Two Thousand Eight Hundred	
			Twenty-six—01-100-Dollars in full of the above	
			account.	

[fol. 114]

X 21 Special

April, 1919.

Westinghouse, Church, Kerr & Company.

In Remitting Refer to Auditor's No. 437,372.

Recorded in April, 1919.

P. O. Box 848, Newport News, Va.

To United States Railroad Administration, Walker D. Hines, Director General of Railroads, Operating Chesapeake and Ohio Railroad

The above is to be regarded as substituted for the name of the Chesapeake and Ohio Railway Company, wherever the name appears in this document.

Dept. Bill No. —

1918, March 21st.

For service of Engine and Crew during the month of February, 1918:

Engineers, 338 hours @ 54½c.	\$184.21
Firemen, 319 hours @ 31½c.	100.48
Firemen, 19 hours @ 32½c.	6.17
Conductors, 296 hours @ 45c.	133.20
Conductors, 42 hours @ 47½c.	19.95
Brakemen, 592 hours @ 41½c.	245.68
Brakemen, 84 hours @ 44c.	36.96
Maintenance of Engines	79.71
11½ gallons valve oil @ 48c.	5.52
12¼ gallons car oil @ 18c.	2.20
6 pounds road cup grease @ 7½c. ....	.45
28 pounds cotton waste @ 12½c.	3.50
96 tons coal @ \$2.12	203.52
23,428 cu. ft. water @ 8c. per 100 cu. ft....	18.74

\$1,040.29

Supervision 25% 260.07

\$1,300.36

For Rental of Engine No. 300, 19 days @		
\$22.50	\$427.50	
For Rental of Engine No. 308, 1 day @		
22.50	22.50	
For Rental of Engine No. 310, 10 days @		
22.50	225.00	
[fol. 115] For Rental of Engine No. 400, 2		
days @ 30.00	60.00	
		\$735.00
		\$2,035.36
		\$2,035.36

N. Newport News Terminal			Examined and Registered:	Approved:
CREDIT			L. B. ENSLOW	J. W. NOKELY,
Trans.	378 F	\$544.74	Aud. of Disbursements	Asst. Federal Auditor.
"	380 F	363.56	Auditor of Disbursements. General Auditor.	
"	382 F	254.40		
"	385 F	23.42		
"	386 F	10.22		
"	387 F	4.36		
M. of E.	308 F	99.66	Receiver, .....19....	
Income	507 F	735.00	the sum of Two Thousand Thirty-five 36/100 Dollars, in full of the above account.	
		\$2,035.36		

X 21 Special

April, 1919.

In Remitting refer to Auditor's No. 437,374.

Recorded in April, 1919.

Westinghouse, Church, Kerr & Company.

P. O. Box 848, Newport News, Va.

To United States Railroad Administration, Walker D. Hines, Director
General of Railroads, Operating Chesapeake and Ohio Railroad

The above is to be regarded as substituted for the name of the Chesapeake and Ohio Railway Company, wherever the name appears in this document.

Dep't Bill No. —

1918, April 26th.

For Service of Engine and Crew furnished during the month of March, 1918:

Engineers, 320 Hours @ 54½ c.	\$174.40	
Firemen, 320 Hours, @ 31½c.	100.80	
Conductors, 308 Hours @ 45c.	138.60	
Conductors, 12 Hours @ 47½c.	5.70	
Brakemen, 616 Hours @ 41½c.	255.64	
Brakemen, 24 Hours @ 44c.	10.56	
[fol. 116] Maintenance of Engines	64.52	
10½ gallons valve oil @ 61 1/6c.	6.42	
9¼ gallons car oil @ 21 1/6c.	2.06	
4 lbs. rod cup grease @ 33 1/3c.	1.33	
34 lbs. cotton waste @ 11¼c.	3.82	
97 tons coal @ #2.33.	226.01	
152,000 gallons water @ 8c. per hundred cu. ft.	16.26	
	<u>\$1,006.12</u>	
Supervision 25%	251.53	
	<u>\$1,257.65</u>	
For Rental of Engine No. 202, 3 days @ \$22.50	\$67.50	
For Rental of Engine No. 300, 10 days @ 22.50	225.00	
For Rental of Engine No. 302, 3 days @ 22.50	67.50	
For Rental of Engine No. 305, 13 days @ 22.50	292.50	
For Rental of Engine No. 308, 1 day @ 22.50	22.50	
For Rental of Engine No. 308, 1 day @ 22.50	22.50	
	<u>\$697.50</u>	
		\$1,955.15
		<u>\$1,955.15</u>

N. Newport News Terminal		
CREDIT		
Material for shops	\$17.04	
Wood & coal stock @	282.51	
M. of E. 307 F	80.64	
Trans. 378 F	513.14	
" 380 F	344.00	
" 385 F	20.32	
Income 507 F	697.50	
	<u>\$1,955.15</u>	

Division)
Examined and Registered:
L. B. ENSLOW
Aud. of Disbursements

Approved:
J. W. NOKELY
Asst. Federal
Auditor

Auditor of Disbursements. General Auditor.

Received,19....
the sum of One Thousand Nine Hundred Fifty.
five.....15/100 Dollars, in full of the above
account.

[fol. 117]

EXHIBIT A. W. B. No. 1

Authorization Number A. 1318.

Executive Approval of Agreement

Agreement No. 1892

New York, Aug. 22, 1917.

From United States of America.

For Construction of Embarkation Camp, Newport News, Va.

Class Agreement —%. Acknowledged by — —.

Date Aug. 22, 1917.

Financial Approval

Credit approval for, Total, \$1,000,000.00.

(X) Maximum Obligation at any one time \$1,000,000.

Credit to expire by limitation January 31, 1918.

(X) "Maximum obligation at any one Time" means not only a amount billed and unpaid, but values of all commitments including orders placed. It is the duty of the Engineers in Charge to see that the amount is not exceeded.

Jno. Seager, Treasurer.

Date: 8/23, 1917.

Approved by—

Jas. Boyd, Vice-President. G. E. T., President.

Engineering Assignment of Agreement

New York, — —, 191—.

Agreement No. —.

From — —.

For —.

[fol. 118]

Date: August 24th, 1917.

Referred to Mr. Bowie for execution.

Reporting through Mr. Van Gelder.

T. N. Gilmore, Vice-President & Chief Engineer.

No work to be executed by Chief Engineer unless this sheet is accompanied by formal papers duly approved or signed below by President or Vice-President of this Company.

Approved for execution to an amount not exceeding \$1,000.00 pending receipt of formal papers.

Date: — —, —.

Contract for Emergency Work

Construction of embarkation camp, Newport News, Va. Contract made and concluded this 16th day of August, 1917, by and between Westinghouse, Church, Kerr & Co., Inc., #37 Wall Street, New York, N. Y., a corporation organized under the laws of the State of Virginia represented by James C. Boyd, Vice-President, party of the first part (Hereinafter called Contractor) and the United States of America, by Colonel I. W. Littell, Q. M. U. S. A. (hereinafter called Contracting Officer), acting by authority of the Secretary of War, party of the second part.

Whereas, the Congress having declared by Joint Resolution approved April 6, 1917, that war exists between the United States of America and Germany, a national emergency exists and the United States urgently requires the immediate performance of the work hereinafter described, and it is necessary that said work shall be completed within the shortest possible time; and

Whereas, it is advisable under the disturbed condition which exist in the contracting industry throughout the country for the United States to depart from the usual procedure in the matter of letting contracts, and adopt means that will insure the most expeditious results; and

Whereas, the Contractor has had experience in the execution of similar work, has an organization suitable for the performance of such work, and is ready to undertake the same upon the terms and conditions herein provided:

[fol. 119] Now, therefore, this contract witnesseth, That in consideration of the premises and of the payments to be made as hereinafter provided, the Contractor hereby covenants and agrees to and with the Contracting Officer as follows:

Article I

Extent of the Work. The Contractor shall, in the shortest possible time furnish the labor, material, tools, machinery, equipment, facilities, and supplies, and do all things necessary for the construction and completion of the following work:

Embarkation Camp in or near the city of Newport News, in the State of Virginia, in accordance with the drawings and specifications to be furnished by the Contracting Officer, and subject in every detail to his supervision, direction and instruction.

The Contracting Officer may, from time to time, by written instructions or drawings issued to the Contractor, make change in said drawings and specifications, issue additional instructions, require additional work, or direct the omission of work previously ordered, and the provisions of this contract shall apply to all such changes, modifications and additions with the same effect as if they were embodied in the original drawings and specifications. The Contractor shall comply with all such written instructions or drawings.

The title to all work completed or in course of construction shall be in the United States; and upon delivery at the site of the work, and upon inspection and acceptance in writing by the Contracting Officer, all machinery, equipment, hand tools, supplies, and materials, for which the Contractor shall be entitled to be reimbursed under paragraph (a) of Article II hereof, shall become the property of the United States. These provisions as to title shall not operate to relieve the Contractor from any duties imposed hereby or by the Contracting Officer.

Article II

Cost of Work. The Contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the Contracting Officer and are as included in the following items:

[fol. 120] (a) All labor, material, machinery, hand tools not owned by the workmen supplies and equipment, necessary for either temporary or permanent use for the benefit of said work; but this shall not be construed to cover machinery or equipment mentioned in section (c) of this Article. The Contractor shall make no departure from the standard rate of wages being paid in the locality where said work is being done, without the prior consent and approval of the Contracting Officer.

(b) All sub-contracts made in accordance with the provisions of this agreement.

(c) Rental actually paid by the Contractor, at rates not to exceed those mentioned in the schedule of rental rates hereto attached, for construction plant in sound and workable condition, such as pumps, derricks, concrete mixers, boilers, clam shell or other buckets, electric motors, electric drills, electric hammers, electric bolts, steam shovels, locomotive cranes, power saws, engineers' levels and transits, and such other equipment as may be necessary for the proper and economical prosecution of the work.

Rental to the Contractor for such construction plant or part thereof as it may own and furnish, at the rates mentioned in the schedule of rental rates hereto attached, except as hereinafter set forth. When such construction plant or any part thereof shall arrive at the site of the work, the Contractor shall file with the Contracting Officer a schedule setting forth the fair valuation at that time of each part of such construction plant. Such valuation shall be deemed final, unless the Contracting Officer shall, within five days after machinery has been set up and is working, modify or change such valuation, in which event the valuation so made by the Contracting Officer shall be deemed final. When and if the total rental paid to the Contractor for any such part shall equal the valuation thereof, no further rental therefor shall be paid to the Contractor and title thereto shall vest in the United States. At the completion of the work, the Constructing Officer may at his option purchase for the United States

any part of such construction plant then owned by the Contractor by paying to the Contractor the difference between the valuation of such part or parts and the total rentals theretofore paid therefor.

Rates of rental as substitutes for such scheduled rental rates may be [fol. 121] agreed upon in writing between the Contractor and the Contracting Officer, such rates to be in conformity with rates of rental charged in the particular territory in which the work covered by this contract is to be performed. If the Contracting Officer shall furnish or supply any such equipment, the Contractor shall not be allowed any rental therefor and shall receive no fee for the use of such equipment.

(d) Loading and unloading such construction plant, the transportation thereof to and from the place or places where it is to be used in connection with said work subject to the provisions hereinafter set forth, the installation and dismantling thereof, and ordinary repairs and replacements during its use in the said work.

(e) Transportation and expenses to and from the work of the necessary field forces for the economical and successful prosecution of the work, procuring labor and expediting the production and transportation of material and equipment.

(f) Salaries of resident engineers, superintendents, timekeepers, foremen, and other employees at the field offices of the Contractor in connection with said work. In case the full time of any field employee of the Contractor is not applied to said work but is divided between said work and other work, his salary shall be included in this item only in proportion to the actual time applied to this work.

(g) Buildings and equipment required for necessary field offices, commissary and hospital and the cost of maintaining and operating said officers, commissary and hospital, including such minor expenses as telegrams, telephone service, expressage, postage, etc.

(h) Such bonds, fire, liability and other insurance as the Contracting Officer may approve or require; and such losses and expenses not compensated by insurance or otherwise, as are found and certified by the Contracting Officer to have been actually sustained (including settlements made with the written consent and approval of the Contracting Officer) by the Contractor in connection with said work, and to have clearly resulted from causes other than the fault or neglect of the Contractor. Such losses and expenses shall not be included in the cost of the work for the purpose of determining the Contractor's fee. The cost of reconstructing and replacing [fol. 122] any of the work destroyed or damaged shall be included in the cost of the work for the purpose of reimbursement to the Contractor, but not for the purpose of determining the Contractor's fee, except as hereinafter provided.

(i) Permit fees, deposits, royalties, and other similar items of expense incidental to the execution of this contract, and necessarily

incurred. Expenditures under this item must be approved in advance by the Contracting Officer.

(j) Such proportion of the transportation traveling and hotel expenses of officers, engineers and other employees of the Contractor as is actually incurred in connection with this work.

(k) Such other items as should, in the opinion of the Contracting Officer, be included in the cost of the work. When such an item is allowed by the Contracting Officer, it shall be specifically certified as being allowed under this paragraph.

The United States reserves the right to pay directly to common carriers any or all freight charges on material of all kinds, and machinery furnished under this contract, and certified by the Contracting Officer as being for installation or for consumption in the course of the work hereunder; the Contractor shall be reimbursed for such freight charges of this character as it shall pay and as shall be specifically certified by the Contracting Officer; but the Contractor shall have no fee based on such expenditures. Freight charges paid by the Contractor for transportation of construction equipment, construction plant, tools and supplies of every character, shall be treated as part of the cost of the work upon which the Contractor's fee shall be based; provided that charges for transportation of such construction equipment, construction plant and tools over distances in excess of five hundred miles shall require the special approval of the Contracting Officer.

No salaries of the Contractor's Executive Officers, no part of the expense incurred in conducting the Contractor's main office, or regularly established branch office, and no overhead expenses of any kind, except as specifically listed above, shall be included in the cost of the work; nor shall interest on capital employed or on borrowed money be included in the cost of the work.

The Contractor shall take advantage to the extent of its ability of all discounts available, and when unable to take such advantage [fol. 123] shall promptly notify the Contracting Officer if its inability and its reason therefor.

All revenue from the operations of the commissary, hospital or other facilities or from rebates, refunds, etc., shall be accounted for by the Contractor and applied in reduction of the cost of the work.

Article III

Determination of Fee.—As full compensation for the services of the Contractor, including profit and all general overhead expense, except as herein specifically provided, the Contracting Officer shall pay to the Contractor in the manner hereinafter prescribed a fee to be determined at the time of completion of the work from the following schedule, except as hereinafter otherwise provided:

If the cost of the work is under \$100,000.00 a fee of ten per cent (10%) of such cost.

If the cost of the work is over \$100,000.00 and under \$125,000.00 a fee \$10,000.00.

If the cost of the work is over \$125,000.00 and under \$250,000.00 a fee of eight per cent (8%) of such cost.

If the cost of the work is over \$250,000.00 and under \$266,666.67 a fee of \$20,000.00.

If the cost of the work is over \$266,666.67 and under \$500,000.00 a fee of seven and one-half per cent ($7\frac{1}{2}\%$) of such cost.

If the cost of the work is over \$500,000.00 and under \$535,714.29 a fee of \$37,500.00.

If the cost of the work is over \$535,714.29 and under \$3,000,000.00 a fee of seven per cent (7%) of such cost.

If the cost of the work is over \$3,000,000.00 and under \$3,500,000.00 a fee of \$210,000.00.

If the cost of the work is over \$3,500,000.00 a fee of six per cent (6%) of such cost.

Provided, however, that the fee upon such part of the cost of the work as is represented by payments to sub-contractors, under subdivision (b) above, shall in each of the above contingencies be five per cent (5%) and no more of the amount of such part of the cost.

The cost of materials purchased or furnished by the Contracting Officer for said work, exclusive of all freight charges thereon, shall be [fol. 124] included in the cost of the work for the purpose of reckoning such fee to the Contractor, but for no other purpose.

The fee for reconstructing and replacing any of the work destroyed or damaged shall be such percentage of the cost thereof—not exceeding seven per cent (7%)—as the Contracting Officer may determine.

The total fee to the Contractor hereunder shall in no event exceed the sum of \$250,000.00, anything in this agreement to the contrary notwithstanding.

Article IV

Payments.—On or about the seventh day of each month the Contracting Officer and the Contractor shall prepare a statement showing as completely as possible: (1) the cost of the work up to and including the last day of the previous month; (2) the cost of the materials furnished by the Contracting Officer up to and including such last day, and (3) an amount equal to three and one-half per cent ($3\frac{1}{2}\%$), except as herein otherwise provided, of the sum of (1) and (2) on account of the Contractor's fee; and the Contractor at such time shall deliver to the Contracting Officer original signed payrolls for labor, original invoices for materials purchased and all other original papers not theretofore delivered supporting expenditures claimed by the Contractor to be included in the cost of the work. If there be any item or items entering into such statement upon which the Contractor and the Contracting Officer cannot agree, the decision of the Contracting Officer as to such disputed item or items shall govern. The Contracting Officer shall then pay to the Contractor on or about the ninth day of each month the cost of the work mentioned in (1) and the fee mentioned in (3) of such statement,

less all previous payments. When the statement above mentioned included any work of reconstructing and replacing work destroyed or damaged, the payment on account of the fee in (3) for such reconstruction and replacement work shall be computed at such rate, not exceeding three and one-half per cent ($3\frac{1}{2}\%$), as the Contracting Officer may determine. The statement so made and all payments made thereon shall be final and binding upon both parties hereto, except as provided in Article XIV hereof. The Contracting Officer may also make payments at more frequent intervals for the purpose of enabling the Contractor to take advantage of discounts at intervals between the dates above mentioned or for other lawful purposes. Upon final completion of said work the Contracting Officer shall pay to the Contractor the unpaid balance of the cost of the work and of the fee as determined under Articles II and III hereof.

Article V

Inspection and Audit.—The Contracting Officer shall at all times be afforded proper facilities for inspection of the work and shall at all times have access to the premises, to the work and material, and to all books, records, correspondence, instructions, plans, drawings, receipts, vouchers, and memoranda of every description of the Contractor pertaining to said work; and the Contractor shall preserve for a period of two years after its completion or cessation of work under this contract, all the books, records and other papers just mentioned. Any duly authorized representative of the Contractor shall be accorded the privilege of examining the books, records, and papers of the Contracting Officer relating to said work for the purpose of checking up and verifying the cost of said work. The system of accounting to be employed by the Contractor shall be such as is satisfactory to the Contracting Officer.

If at any time the Contracting Officer shall find that bills for labor, material, or other bills legitimately incurred by the Contractor hereunder, are not promptly paid by the Contractor, the Contracting Officer may, in his discretion, refuse to make further payments to the Contractor until all such obligations past due shall have been paid. Should the Contractor neglect or refuse to pay such bills within five days after notice from the Contracting Officer so to do, then the Contracting Officer shall have the right to pay such bills directly, in which event such direct payments shall not be included in the cost of the work.

Article VI

Special Requirements—The Contractor hereby agrees that it will:

(a) Begin the work herein specified at the earliest time practicable, and diligently proceed so that such work may be completed at the earliest possible date.

(b) Promptly pay for all labor, material or other service rendered.

(c) Procure, and thereafter maintain such insurance, in such forms and in such amounts, and for such periods of time as the Contracting Officer may approve or require.

(d) Procure all necessary permits and licenses, and obey and abide by all laws, regulations, ordinances, and other rules applying to such work, of the United States of America, of the State or Territory wherein such work is done, of any subdivision thereof, or of any duly constituted public authority.

(e) Unless this provision is waived by the Contracting Officer, insert in every contract made by it for the furnishing to it of services, materials, supplies, machinery and equipment, or the use thereof, for the purposes of the work hereunder, a provision that such contract is assignable to the United States; will make all such contracts in its own name, and will not bind or purport to bind the United States or the Contracting Officer thereunder.

(f) In every sub-contract made in accordance with the provisions hereof, require the sub-contractor to agree to comply fully with all the undertakings and obligations of the Contractor herein, excepting such as do not apply to such sub-contractor's work.

(g) At all times keep at the site of the work a duly appointed representative who shall receive and execute on the part of the Contractor such notices, directions and instructions as the Contracting Officer may desire to give.

(h) At all times use its best efforts in all its acts hereunder to protect and subserve the interest of the Contracting Officer and the United States.

Article VII

Right to Terminate Contract.—Should the Contractor at any time refuse, neglect, or fail in any respect to prosecute the work with promptness and diligence or default in the performance of any of the agreements herein contained, the Contracting Officer may, at his option, after five days written notice to the Contractor, terminate this contract, and may enter upon the premises and take possession, for the purpose of completing said work, of all materials, tools, equipment, and appliances, and all options, privileges and rights, [fol. 127] and may complete, or employ any other person or persons to complete said work. In case of such termination of the contract, the Contracting Officer shall pay to the Contractor such amounts of money on account of the unpaid balance of the cost of the work and of the fee as will result in fully reimbursing the Contractor for the cost of the work up to the time of such termination, plus a fee computed thereon at the rate or rates for monthly payments set forth in Article IV hereof; and the Contracting Officer shall also pay to the Contractor compensation, either by purchase or rental at the election of the Contracting Officer, for any equipment retained; such compensation, in the event of rental, to be in

accordance with paragraph (c) of Article II, and in the event of purchase to be based upon the valuation determined by the Contracting Officer as of the time of his taking such possession. The Contractor hereby agrees that such payments when made shall constitute full settlement of all claims of the Contractor against the Contracting Officer and the United States or either of them for money claimed to be due to the Contractor for any reason whatsoever. In case of such termination of the contract the Contracting Officer shall further assume and become liable for all such obligations, commitments, and unliquidated claims as the Contractor may have theretofore in good faith undertaken or incurred in connection with said work, and the Contractor shall, as a condition of receiving the payments mentioned in this Article, execute and deliver all such papers, and take all such steps as the Contracting Officer may require for the purpose of fully vesting in him the rights and benefits of the Contractor under such obligations or commitments. When the Contracting Officer shall have performed the duties incumbent upon him under the provisions of this Article, the Contracting Officer shall thereafter be entirely released and discharged of and from any and all demands, actions, or claims of any kind, on the part of the Contractor hereunder or on account hereof.

Article VIII

Abandonment of Work by Contracting Officer.—If conditions should arise which, in the opinion of the Contracting Officer, make it advisable or necessary to cease work under this contract, the Contracting Officer may abandon the work and terminate this contract. In such case the Contracting Officer shall assume and become liable for all such obligations, commitments and unliquidated [fol. 128] claims as the Contractor may have theretofore, in good faith, undertaken or incurred in connection with said work; and the Contractor shall, as a condition of receiving the payments mentioned in this Article, execute and deliver all such papers, and take all such steps as the Contracting Officer may require for the purpose of fully vesting in him the rights and benefits of the Contractor under such obligations or commitments. The Contracting Officer shall pay to the Contractor such an amount of money on account of the unpaid balance of the cost of the work and of the fee, as will result in the Contractor receiving full reimbursement for the cost of the work up to the time of such abandonment, plus a fee to be computed in the following manner: To the cost of the work up to the time of such abandonment shall be added the amount of the contractual obligations or commitments assumed by the Contracting Officer, and such total shall be treated as the cost of the work, upon which the fee shall be computed in accordance with the provisions of Article III hereof. When the Contracting Officer shall have performed the duties incumbent upon him under the provisions of this Article, the Contracting Officer and the United States shall thereafter be entirely released and discharged of and from any and all demands, actions or claims of any kind on the part of the Contractor hereunder or on account hereof.

Article IX

Bond.—The Contractor shall prior to commencing the said work furnish a bond, with sureties satisfactory to the Contracting Officer, in the sum of Two Hundred Fifty Thousand (\$250,000.00) Dollars, conditioned upon its full and faithful performance of all the terms, conditions and provisions of this contract, and upon its prompt payment of all bills for labor, material, or other service furnished to the Contractor.

Article X

Convict Labor.—No person or persons shall be employed in performance of this contract who are undergoing sentence of imprisonment at hard labor imposed by the courts of any of the several States, territories, or municipalities having criminal jurisdiction.

[fol. 129]

Article XI

Hours and Conditions of Labor.—No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the Contractor, or any sub-contractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight (8) hours in any one calendar day upon such work, such prohibition being in accordance with the Act approved June 19, 1912, limiting the hours of daily service of mechanics and laborers on work under contracts to which the United States is a party. For each violation of the requirements of this Article a penalty of Five Dollars (\$5.00) shall be imposed upon the Contractor for each laborer or mechanic for every calendar day in which said employee is required or permitted to labor more than eight (8) hours upon said work, and all penalties thus imposed shall be withheld for the use and benefit of the United States; provided, that this paragraph shall not be enforced nor shall any penalty be exacted in case such violation shall occur while there is in effect any valid Executive order suspending the provisions of said Act approved June 19, 1912, or waiving the provisions and stipulations thereof with respect to either this contract or any class of contracts in which this contract shall be included, or when the violation shall be due to any extraordinary events or conditions of manufacture, or to any emergency caused by fire, famine, or flood, by danger to life or property, or by other extraordinary events or conditions on account of which, by subsequent Executive order, such past violation shall have been excused.

In the event of any dispute with reference to wages, hours, or other conditions appertaining to said work, between the Contractor or any sub-contractor and labor employed by him on said work, the Contractor or sub-contractor shall immediately notify the Contracting Officer of the existence of such dispute and the reasons therefor. The Contracting Officer may, at his option, instruct the Contractor or sub-contractor involved in such dispute as to the method or steps which the Contractor or sub-contractor should follow with reference

thereto, and the Contractor or sub-contractor shall thereupon comply with such instructions.

Article XII

[fol. 130] **Right to Transfer or Sublet.**—Neither this contract, nor any interest therein, shall be assigned or transferred. The Contractor shall not enter into any sub-contract for any part of the work herein specified without the consent and approval in writing of the Contracting Officer. In case of such assignment, transfer, or sub-letting without the consent and approval, in writing, of the Contracting Officer, the Contracting Officer may refuse to carry out this contract either with the transferror or transferee, but all rights of action for any breach of this contract by the Contractor are reserved to the United States.

Article XIII

No Participation in Profits by Government Officials.—No member of, or delegate to Congress, or Resident Commissioners, nor any other person belonging to or employed in the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom, but this Article shall not apply to this contract so far as it may be within the operation or exception of Section 116 of the Act of Congress approved March 4, 1909 (35 Stats. 1109).

Articles XIV

Settlement of Disputes.—This contract shall be interpreted as a whole and the intent of the whole instrument, rather than the interpretation of any special clause, shall govern. If any doubts or disputes shall arise as to the meaning or interpretation of anything in this contract, or if the Contractor shall consider himself prejudiced by any decision of the Contracting Officer made under the provisions of Article IV hereof, the matter shall be referred to the Officer in charge of Cantonment Construction for determination. If, however, the Contractor shall feel aggrieved by the decision of the Officer in charge of Cantonment Construction, he shall have the right to submit the same to the Secretary of War, whose decision shall be final and binding upon both parties hereto.

Article XV

This contract shall bind and inure to the Contractor and its successors. It is understood and agreed that wherever the words "Contracting Officer" are used herein the same shall be construed to include his successor in office, any other person to whom the duties of the Contracting Officer may be assigned by the Secretary of War and any duly appointed representative of the Contracting Officer.

Witness the hands of the parties hereto the day and year first above written, all in triplicate.

Westinghouse, Church, Kerr & Co. Inc., by Jas. Boyd, Vice-President. Witnesses: H. M. Van Gelder, Jno. Seager, Secretary. United States of America, by I. W. Littell, Constructing Officer. Witnesses: H. E. Johnston, H. L. Francisco.

Schedule of Rental Rates

(The rates mentioned are per day)

Automobiles	\$5.00
Adding and Listing Machines .....	.20
Buckets, Tipple and bottom Dump .....	.25
Boring Machine, Pneumatic .....	.50
Boring Machine, Electric .....	.50
Buckets, Orangepeel, 1 yard	3.50
Buckets, Orangepeel, less than 1 yard	2.00
Buckets, Clamshell	2.00
Boiler, and 3 drum engine	3.50
Boiler, and 2 drum engine	3.00
Boiler, and 1 drum engine	2.50
Boiler only, 30 h. p. and smaller	1.50
Boiler only, larger than 30 h. p.	2.00
Block Machine, Concrete	1.50
[fol. 132] Cars, Skip, 1½ yards .....	.25
Cars, Skip, 3 yards .....	.50
Cars, Steel, 1 yd. and smaller .....	.15
Cars, 4 yd. wooden .....	.25
Cars, 6 yd. wooden .....	.75
Cars, 12 yd. wooden	2.00
Cars, 1 Hopper, Radial Gate .....	.25
Crushers only	2.00
Crushers, with elevator and screen	3.00
Conveyor, gravity per 100 feet	1.00
Compressor, 10 x 10 with Steam Engine	2.50
Compressor, 8 x 8 Belt Driven	1.00
Compressor, with Gasoline Engine on Wheels	5.00
Compressor, Westinghouse, 9½ inch	1.00
Cableways, without Engine	4.00
Drill, Auto Traction	5.00
Dump Wagons .....	.25
Diving Outfit with Pumps	10.00
Derricks, 60 feet to 85 feet	2.00
Derricks, 30 feet to 59 feet	1.50
Derricks, less than 30 feet	1.00
Derricks, Breast .....	.25
Derricks, Circle Swing .....	.25
Elevators, Platform or Bucket .....	.25
Elevators, with Bins for Concrete .....	.50
Engines, Skelton, 3 drum	2.00
Engines, Skelton, 2 drum	1.50

Engines, Skelton, 1 drum.....	1.00
Engines, Steam, Horizontal, 11 to 40 h. p.....	1.50
Engines, Steam, Upright, to 10 h. p.....	.50
Engines, Gasoline to 8 h. p.....	.50
Engines, 2 Drum, with Electric Motor.....	4.00
Engines, Gasoline, 10 h. p.....	1.00
Engines, Derrick, Swinging.....	.50
Hammers Rivetting.....	.25
Hod Elevator Machine.....	1.00
Levelling Instruments, Engineers'.....	.25
Locomotive, 36 inch Gauge.....	\$5.00
Locomotive, Standard Gauge.....	10.00
Mixers, with Boiler Sideload.....	4.00
Mixers, with Electric Motors, 1 yard.....	4.00
Mixers, without Boiler, less than 1 yd.....	2.00
Mixers without Boiler, 1 yd. and larger.....	3.50
Mixers with Gasoline Engine.....	3.00
Motorcycles.....	1.00
[fol. 133] Motors, 2 h. p.....	.15
Motors, 5 h. p.....	.25
Motors, 10 h. p.....	.50
Motors, 25 h. p.....	1.00
Motors, 50 h. p.....	2.00
Pumps, Centrifugal, 10 inch, Belt Driven.....	3.00
Pumps, Centrifugal, 10 inch with Motor Attached.....	4.00
Pumps, Centrifugal, 8 inch Steam connected.....	2.00
Pumps, Centrifugal, 6 inch Steam Connected.....	1.50
Pumps, centrifugal, 4 inch Steam connected.....	1.00
Pumps, Duplex and Triplex to 3 inch.....	.50
Pumps, Pulsometer to 4 inch.....	1.55
Pumps, Diaphragm.....	.20
Pumps, Diaphragm, with Gas Engine.....	1.05
Pumps, Triplex, with Belt Drive.....	.20
Pile Drivers, Drop.....	1.50
Pile Drivers, Drop, with Single Drum Engine and Boiler ..	3.50
Pile Hammers, Steam up to 2,500 lbs.....	3.00
Pile Hammers, Steam, Larger than 2,500 lbs.....	5.00
Rail, per ton.....	.06
Roller, Horse.....	1.00
Steam Drills.....	1.00
Small Air Drills.....	.50
Steam Roller.....	8.00
Steam Shovel.....	30.00
Sprinkling Cart.....	1.00
Saw Benches.....	.25
Saw Benches, with Motor or Gasoline Engine.....	.50
Scale Boxes.....	.25
Scraper, Wheel.....	.50
Transits.....	.50
Typewriter.....	.10
Fuel and Lubricants not included in these prices.	

Address Reply to Quartermaster General, Washington, D. C.

War Department, Office of the Quartermaster General of the Army,
Washington

August 3, 1917.

No. —.

From: Officer in charge of Cantonment Construction.

To: Westinghouse, Church, Kerr & Company, New York City.

[fol. 134] Subject: —.

Answered by: — —.

1. You are hereby informed that Captain H. K. Love has been appointed Constructing Quartermaster for the embarkation camp at Newport News, Va. He will give you such instructions and information as is necessary in connection with the work.

By authority of the Secretary of War:

I. W. Littell, Colonel, Quartermaster Corp-, in Charge of
Cantonment Construction.

MJW—MJB.

In reply please quote our number.

August 6, 1917.

I. W. Littell, Colonel, Quartermaster Corp-, in Charge of Cantonment Construction, War Department, Washington, D. C.

SIR: We have your letter of Aug. 3, notifying us of the appointment of Captain H. K. Love, as Constructing Quartermaster for the embarkation camp at Newport News, Va.

We will be governed by instructions and information furnished us by Captain Love.

Respectfully your, Jas. Boyd, Vice-President.

JCCB-ARM.

IN CIRCUIT COURT OF CITY OF RICHMOND

ORDER SETTLING BILL OF EXCEPTIONS No. 1

And this being all the evidence introduced upon the trial of said cause, the plaintiff, by counsel, moved the court to enter up judgment in his favor for the sum of \$7,533.50, with interest thereon from the 1st day of Jan., 1918, until paid, and his costs, but the court, being of the opinion that the plaintiff was not entitled to recover of the defendant in this cause, in any amount, gave judgment in favor of the defendant, to which ruling and action of the court the plaintiff, by counsel, excepted.

Thereupon, the plaintiff, by counsel, moved the court to set aside [fol. 135] said judgment and award him a new trial, which motion the court overruled and declined to set aside said judgment and

award him a new trial, to which ruling and action of the court the plaintiff, by counsel, excepted, and tenders this his bill of exception No. 1, and prays that it may be signed, sealed and made a part of the record in this case, which is accordingly done on this 6th day of July, 1922, within the time prescribed by law.

R. Carter Scott. (Seal.)

IN CIRCUIT COURT OF CITY OF RICHMOND

[Title omitted]

Bill of Exceptions No. 2

CAPTION

Be it Remembered, That upon the trial of this cause and during the progress of the testimony given by A. W. Bowie, a witness duly sworn and introduced on behalf of the defendant, and after he had testified as set out in Bill of Exceptions No. One, which is herewith filed and is now made a part of this bill, and during the course of his cross examination by D. H. Leake, of counsel for the plaintiff, the following colloquy took place:

COLLOQUY BETWEEN COURT AND COUNSEL

"By Mr. D. H. Leake:

Q. When did you first make this point that you were doing work that *that* the railroad ought to do, anyhow? When did you first make the claim which you are making now, and say that you were doing work under this contract that the railroad ought to have done, anyhow, which you have stated just now?

A. The first time I talked to Mr. Ford probably.

Q. Isn't it a fact you didn't make it until after the work had been done?

Witness: You mean regarding this special bill?

Mr. D. H. Leake: Yes.

A. Probably not because we did not get any bill for four months after we started the locomotive.

[fol. 136] Q. You didn't say anything about that part until after the work had been done?

A. No, sir, because we were given to understand there was no charge to be made for it.

Q. Who gave you to understand?

A. Mr. Ford.

Mr. D. H. Leake: I object.

The Court: Overruled.

Mr. D. H. Leake: "I note an exception."

IN CIRCUIT COURT OF CITY OF RICHMOND
ORDER SETTLING BILL OF EXCEPTIONS No. 2

To the statement given by the witness under the circumstances set out, that the defendant was given to understand by Mr. Ford that there was to be no charge for the services referred to, the plaintiff, by counsel, objected; but the court overruled said objection and allowed said evidence to be introduced, to which ruling and action of the court the plaintiff, by counsel, excepted and tenders this his Bill of Exceptions No. 2, and prays that it may be signed, sealed and made a part of the record in this case, which is accordingly done, on this 6th day of July, 1922, within the time prescribed by law.

R. Carter Scott. (Seal.)

IN CIRCUIT COURT OF CITY OF RICHMOND

[Title omitted]

STIPULATION RE EXHIBIT E. I. F. No. 4

It is stipulated by and between the parties hereto as follows:

(1) That in making up the record for appeal in this case, the blue print map introduced in evidence by the defendant upon the cross-examination of E. I. Ford, identified as "Exhibit E. I. F. No. 4," need not be copied in the record by the clerk, but the original exhibit itself shall be certified to and transmitted with the record on appeal. [fols. 137 & 138] (2) In printing the record in the Appellate Court or Courts, should a writ of error or other Appellate process be awarded herein, it shall not be necessary for the blue print map introduced in evidence by the defendant upon the cross-examination of E. I. Ford, identified as "Exhibit E. I. F. No. 4," to be printed or reproduced, but the original exhibit itself may be used for all purposes in the Appellate Court or Courts as fully and completely as if the same was regularly printed or reproduced, as a part of the printed record.

Chesapeake & Ohio Railway Company, by D. H. & Walter Leake, Sherlock Bronson, Counsel. Westinghouse, Church, Kerr & Co., Inc., by Munford, Hunton, Williams & Anderson, Counsel.

Transcript from record: Teste: E. M. Rowelle, Clerk.
Fee for Transcript, \$64.00.

IN CIRCUIT COURT OF CITY OF RICHMOND

CLERK'S CERTIFICATE

I, E. M. Rowelle, Clerk of the Circuit Court of the City of Richmond, do hereby certify that the attorneys for the defendant has had notice of the plaintiff's intention to apply for the foregoing transcript.

E. M. Rowelle, Clerk.

A Copy—Teste: H. Stewart Jones, C. C.

[fol. 139] IN SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

ARGUMENT AND SUBMISSION—April 1, 1924

Upon a writ of error and supersedeas to a judgment rendered by the Circuit Court of the City of Richmond on the 10th day of May, 1922.

This case was this day fully heard upon a transcript of the record of the judgment aforesaid and arguments of counsel; but, because the court here is not yet advised of its judgment to be given in the premises, time is taken to consider thereof.

A Copy—Teste: H. Stewart Jones, C. C.

IN SUPREME COURT OF APPEALS OF VIRGINIA

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

v.

WESTINGHOUSE, CHURCH, KERR & Co., INC.,

and

WALKER D. HINES, Director General of Railroads (Operating Chesapeake & Ohio Railroad),

v.

WESTINGHOUSE, CHURCH, KERR & Co., INC.,

Judge Robert R. Prentis.

Circuit Court of City of Richmond

OPINION—June 12, 1924

These cases were heard together and upon the same testimony. They are actions of assumpsit for the use of an engine and expenses of its operation, the road being under Federal control during part

of the period involved. A jury was waived and all questions of law [fol. 140] and fact were submitted to the judge of the trial court, so that where the evidence conflicts upon any material point, the judgment of the trial court on the facts will be given the same weight as if it were the verdict of a jury. *F. W. Stock & Sons v. Owen*, 129 Va. 261, 22 Va. App. 210, 105 S. E. 587.

Ignoring the conflicts in the testimony which have been determined in favor of the defendant, the pertinent facts are these:

Westinghouse, Church, Kerr & Co., Inc., hereinafter called the contractors, entered into a contract with the United States Government for the construction of embarkation facilities at Newport News during the World War. Large quantities of material for use in such construction had arrived over the lines of the Chesapeake and Ohio Railway Company at Newport News, and there was great congestion there in the railway yard, because of this and of other activities there growing out of the war. This congestion is described by all of the witnesses as very great indeed and the railway company was clearly failing to deliver freight to the consignees within a reasonable time. The shipments here involved were in carloads, and these delayed cars were standing upon the tracks in the congested yard along with a great many cars for other consignees, so that the building operations were greatly impeded by these unreasonable delays in the delivery of such cars.

When the correspondence upon which these actions are based occurred, that condition is thus described: The contractor "experienced more and more difficulty in obtaining the necessary service on the tracks; in other words, the C. & O. would have cars in their yard for a week or ten days or two weeks before they would deliver to us on our siding, principally through the lack of, as they put it train crews or engine facilities or some other thing so that we had very many conferences with Mr. Ford (superintendent of terminals at Newport News and later general superintendent at Newport News) with a view of eliminating this condition, and he finally stated to me that the only possibility of their being able to make these deliveries of material to us in time to avoid delays in the construction work would be by assigning to us a locomotive. Meantime we had had about a thousand cars received up to that time and a large part of the cars were buried in the storage tracks in the C. & O. yards, * * * " [fol. 141] Under these conditions, after personal interviews, these letters passed:

"Newport News, Va., September 28, 1917.

"Chesapeake & Ohio Railroad Co., Newport News, Va.

"Attention Mr. Ford, Supt. of Terminal. 1892-6

"GENTLEMEN: Referring to our conversation with you to-day, we believe the switching problem is getting so heavy on account of the work at various sites that it would be advisable for you to assign us an engine and crew on your usual basis, billing us for cost of operation as you may elect.

"We would appreciate it if you would arrange for this engine and crew at the earliest possible moment, and also advise us if there is anything we can do towards helping out in furnishing a crew for this engine.

"Yours very truly, Westinghouse, Church, Kerr & Company.
Alfred W. Bowie, Engineer in Charge."

To which Mr. Ford replied September 29th thus:

"GENTLEMEN: Your letter of the 28th inst. under file 1892-6, with respect to providing an engine and crew to take care of your business at the various camp sites.

"Beg to state that this engine will be assigned to your work, commencing Monday night and you will be billed for the use of the engine and crew, together with the cost of supplies, repairs, etc., plus ten per cent."

Sidetracks for the delivery of carload shipments had been constructed from the main line of the railroad company into the camps which were being constructed. The contractor employed A. G. Quarles, a man of 28 years railroad experience, who had been in the employment of the railway company, and for 17 years had acted as yard master at the Richmond yards; and put under him eight men, [fol. 142] also their employees. At that time the conditions with the railway company at Newport News were such that apparently it was not only not able to deliver the cars, but was also unable to keep the records of the arrival and location of the cars for the various consignees. Under the direction of Quarles, these employees of the contractor were stationed in the yards and required to locate the cars consigned to the contractor, place tags or placards on them, indicating the siding upon which they were to be placed. The engine which, according to the claim of the railway company, was thus "rented" to the contractor, and according to the claim of the contractor was thereby "assigned" to it, was used to deliver for unloading these cars, estimated altogether during the period involved to be 6,500 in number, upon the switches or delivery tracks of the contractor—that is, it was used, in railway vernacular, to "spot" the cars. The immediate direction of the operation of this engine was by Quarles, the employee of the contractor, subject to the general direction and supervision of the yardmaster of the railway company in charge of the Newport News yard, and at night, when Quarles was off duty, the engine assigned to this work "was operated under the immediate direction of the C. & O. yard master."

The plaintiffs seek to recover rental for the use of the engine specially assigned to this work, and the bills are made up of a per diem charge, cost of materials used in the operation of the engine, the wages of railway employees so engaged, with an additional charge of ten per cent for supervision, claimed, except as to the supervision charge, to be in accordance with a circular of the railroad company covering such rentals of equipment. There was no tariff filed either with the Interstate Commerce Commission or with the State Corpora-

tion Commission of Virginia, specifying such a rental charge, and the amounts which the plaintiffs seek to recover are independent of and in addition to rates for transportation service which are on file with each of the commissions.

The actions are defended on two grounds:

1. That the service performed by these engines was a service which the plaintiffs should have rendered under the aggregate line-haul charge paid on the freight, and that the supposed contract was without lawful consideration and void; and

[fol. 143] 2. That the contract violated the Interstate Commerce Act and the laws of the State of Virginia in such case made and provided, and was, therefore, void and unenforceable.

To give proper consideration to these defenses, it is proper to consider the character of the service performed.

It is perfectly clear, under the tariffs on file, that the line-haul rates on these cars entitled the consignees to have them "spotted" or placed upon these private delivery sidings to be unloaded. As expressed by the witness Ford, the consignee was entitled to one placement of the car "on a track agreed upon by the railroad and the party owning the commodity, which would either have to be a general delivery, public delivery you might say, or a private industrial siding." That this expresses the true construction of the applicable rate which was published and filed is conceded.

Ignoring the fact that an inconsequential number of these cars, not exceeding 25, were moved a second time because improperly spotted (for which additional movement the railway company is entitled to a switching charge in accordance with the published tariff); these cars were placed on the delivery tracks of the contractor, and the obligation to do this without additional charge was clearly upon the railway company.

One question at issue is said to be whether or not this engine was assigned or rented. The learned attorneys for the company make this frank and correct statement of this issue: "Were we to admit the correctness of the contention that this was a mere 'assignment' of an engine, without consideration, there would be no need to further contest the decision of the trial court, since these actions are based upon compensation for the use of the engine under the contract.

"The distinction between a rented and an assigned engine is actual and fundamental. A rented engine presupposes turning over the exclusive control and use thereof for a pecuniary compensation, whereas, an 'assigned engine,' in the sense of the contention, means the allocation to a particular shipper by the railroad of an engine for the performance of a railroad service. The railroad retains no control over the services of a rented engine. The use to which it is put is dependent upon the desires of the lessee. Control of the use of an 'assigned engine' in the sense to which we have referred, is always with the railroad, and no consideration passes for its use."

[fol. 144] While the language of the correspondence upon which the actions are based is not easily explicable, it does seem fair to assume that when Ford, the company's representative, in that correspondence states that the engine will be assigned, he thoroughly understood the sense in which the word "assigned" is generally used when referring to railway equipment; and that he did not have the rental contract circular in mind at the time he wrote that letter is suggested by the fact that he named ten per cent as the railway's compensation over and above the charge for use of the engine, wages of the engineman and crew, cost of supplies and repairs, whereas the rental circular provides: "All labor including service of crew, supplies and materials furnished, and tools or parts lost or broken, will be billed on basis of actual cost, plus Twenty-five (25%) Per Cent."

Whether this engine was technically assigned or not, it was used in the performance of a transportation service in spotting these cars, for which service the company has already been fully paid in the line-haul rate. This was a service which manifestly the company was under obligation to perform, and from the performance of which it can only excuse itself by showing an impossibility of performance. This use of the engine also aided in relieving the congestion and expedited deliveries not only to the contractor but also to other consignees at Newport News. That there was no such impossibility of performance is well shown by the testimony of one of the defendant's witnesses, and is also apparent. What the contractor, by the use of one of the company's own engines and crew, accomplished, the railway company itself could have accomplished if it had used the same means, and there is nothing to show any such impossibility. That it necessitated the employment of more labor and the exercise of greater diligence may be apparent, but that the company owed this diligence to the contractor as well as to all others whose shipments were delayed is equally apparent.

We do not think it necessary to consider or discuss the cases upon which the railway company relies, in which the services referred to, although within the definition of transportation services, were nevertheless special, and were not embraced within its duties as a common carrier. *Clough v. Grand Trunk Railway*, 155 Fed. 81, is typical of that line of cases. There a circus company, owning its own cars, contracted with the railroad company for the hire of motive power and the use of the tracks and trainmen to be considered as the circus company's servants, for the transportation of a train from one place [fol. 145] to another; the contract exempting the railroad company from liability for injuries to any person or persons using the train, from whatever cause; and it was held that the railroad company being under no legal duty to move the circus company in the manner specified; the contract was not contrary to public policy. There are many such cases, but in none of them was there any duty upon the carrier to perform the particular service involved. This is the fundamental difference between those cases and this. Here the service performed by the railway employees with the railway equipment was the precise service which the company was then under immediate

obligation to perform with reasonable promptness under the circumstances and for which it has already been paid.

We do not think it necessary to consider any other feature of the case, for there is nothing in the record which can vary or modify the result. There was no legal consideration for the promise relied on, and the trial court rightly determined that the railway company had no right to recover.

Affirmed.

IN SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

JUDGMENT—June 26, 1924

Upon a Writ of Error and Supersedeas to a Judgment Rendered by the Circuit Court of the City of Richmond on 10th Day of May, 1922

"This cause, which is pending in this court at its place of session at Richmond, having been fully heard but not determined at said place [fol. 146] of session; this day came here the parties by counsel, and the court having maturely considered the transcript of record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore considered that the same be affirmed, and that the plaintiff in error pay to the defendant in error thirty dollars damages, and also its costs by it expended about its defence in this behalf herein.

Which is ordered to be entered in the order book here and forthwith certified, together with a certified copy of the opinion in this case, to the clerk of this court at Richmond, who will enter this order in the order book there and certify it to the said Circuit Court.

Defendant in error's costs at Wytheville \$1.77.

A Copy—Teste: J. M. Kelly, C. C."

Teste: H. Stewart Jones, C. C.

Defendant in error's costs at Richmond:

Attorney's fee	\$20.00
Clerk's small fees	2.59
	<hr/>
	\$22.59

Teste: H. Stewart Jones, C. C.

IN SUPREME COURT OF APPEALS

[Title omitted]

[fol. 147]

PETITION FOR REHEARING

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

The joint and separate petition of the The Chesapeake and Ohio Railway Company and of Walker D. Hines, Director General of Railroads (operating The Chesapeake & Ohio Railroad), respectfully represent that they are aggrieved by the judgment of this Honorable Court rendered on June 12th, 1924, affirming the judgment of the Circuit Court of City of Richmond in the above styled cases; the two cases being heard together and upon the same testimony. Petitioners, therefore, respectfully pray that the said causes may be reheard for the following, among other, reasons.

The facts of the case are stated in the petition for writ of error, in the briefs of counsel and in the opinion of the Court, and need not, therefore, to be restated herein.

The fundamental error in the Court's holding, petitioners respectfully submit, is stated in the conclusion of the opinion, which statement is the evident basis of the Court's decision, and is as follows:

"Here the service performed by the railway employees with the railway equipment was the precise service which the Company was then under immediate obligation to perform with reasonable promptness under the circumstances and for which it has already been paid.

"We do not think it necessary to consider any other feature of the case, for there is nothing in the record which can vary or modify the result. There was no legal consideration for the promise relied on, and the trial court rightly determined that the railway company had no right to recover."

The Court evidently overlooks the fact that while it is the duty of a carrier under its line-haul rate to once "spot" a car for a shipper, this duty is subject to the same duty which is owed to all other shippers at the same time and same place; and under the same conditions; and that consequently it is not the carrier's duty to furnish special facilities to spot cars for a special shipper. Such a shipper, so far as common-carrier duty is concerned, must bide his time along with all the other shippers, and wait for the placement of his cars in regular course. Moreover, since a common carrier is only under obligation to furnish facilities adequate for [fol. 148] normal conditions, if abnormal and particularly if unprecedented conditions (such as undoubtedly prevailed in the present case) exist, the carrier is under no further duty than to use such facilities as it has at hand with such reasonable dispatch as

these facilities will afford, and this too, with due regard to the equal rights of all the shippers respectively.

Thus, in 10 C. J. 79, this is said:

"It (carrier) is not required to provide facilities to meet an unexpected and unprecedented rush of business, or unusual and extraordinary contingencies, which ordinary prudence or foresight could not anticipate, but is bound only to provide facilities for such transportation as might reasonably be anticipated." Citing numerous cases.

In *Pennsylvania R. Co. v. Puritan Coal Co.*, 237 U. S. 121, 59 L. ed. 837, the court says:

" * * * The carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made, and which it could not reasonably have been expected to meet in full."

In *Shoptaugh v. St. Louis & S. F. R. Co.*, 147 Mo. App. 8, the Court says:

" * * * A railroad carrier need not be ready to handle any accession of business, however great, which some unforeseeable condition may cause; and in case an extraordinary traffic occurs and consequent congestion of freight, the carrier must distribute its cars at the various stations in proportion to their needs."

The authorities might be multiplied indefinitely. See generally note to *Illinois & C. R. Co. v. River Coal & C. Co.*, 44 L. R. A. (N. S.), 646-650, and cases cited.

At the time of the transactions in question, the United States was engaged in a world-wide war. The nations were at Armageddon. There was a congestion of cars, equipment, traffic, freight, etc., along the ports of the Atlantic seaboard such as had never been seen before; and the record is replete with evidence that this was particularly true of the port at Newport News. It was, therefore, not pre-[fol. 149] tended in the present case that the C. & O. Ry. Co., under the pressure of such a sudden and stupendous emergency, was under obligations to have supplied cars, equipment and furnished employees and facilities sufficient to transport and deliver shipments with the same dispatch as would be expected in normal times. Consequently, more than ordinary delays in the delivery of shipments were to be expected, and in the regular course of business, were absolutely unavoidable.

It was precisely for the reason that if the defendant had waited for the delivery of its cars in the regular course of business (so far as common-carrier obligations were concerned) it could not have got the shipments with the same speed and facility with which the defendant desired to get them, that the defendants decided to hire an engine and crew to drill out and place the cars for themselves.

Thus, Quarles, the director of operations and witness for the defendant, testified (Rec., p. 79):

"After being out there several days and working with the C. & O. yard men in order to get the material over, I found that we were not getting anywhere, we were not getting the material, it was impossible for the service to be performed as necessary to the amount of men that we employed to unload that material and to work it up as it was unloaded, and I stated to our traffic manager, Mr. Smith, 'I don't see but one way out of this; that will be for the C. & O. to assign us a special engine for my use entirely to handle our freight.'"

And Bowie, another witness for the defendant, testified that the reason the defendant asked for the locomotive in question was that "the yard was entirely swamped; it was trying to handle more traffic than capable of doing." Rec., p. 59.

See also the contract set out below.

Accordingly the Westinghouse, Church, Kerr & Co. entered into a contract to rent the engine and hire the crew from The Chesapeake and Ohio Railway Co. and the Director General of Railroads. It is undisputed that the contract was carried out. It is undisputed that the amount due The C. & O. Ry. Co. under this contract is \$7,533.50 as of December 31, 1917, and the amount due the Director General of Railroads is \$5,765.43 as of April 1, 1918.

Any point made upon the expression "assign" is merely a play upon words, *nam* manifestly amounts to no more than "begging the question." Every rental of personal property is an assignment for a consideration; every formal contract of lease contains the word "assigns"; it is the technically correct expression for the transfer of personal property. The real question is whether the property here involved was assigned for a consideration or not; and that the property was assigned for a consideration in the present case is put beyond dispute by the contract itself.

Thus, the letter of the defendant is as follows:

"Newport News, Va., September 28, 1917.

Chesapeake and Ohio Railroad Co., Newport News, Va.

Attention Mr. Ford, Supt. of Terminal. 1892-6

GENTLEMEN: Referring to our conversation with you today, we believe the switching problem is getting so heavy on account of the work at the various sites that it would be advisable for you to assign us an engine and crew *on your usual basis, billing us for cost of operation as you may elect.* (Italics added.)

We would appreciate it if you would arrange for this engine and crew at the earliest possible moment and also advise us if there is anything we can do towards helping out in furnishing a crew for this engine.

Yours very truly, Westinghouse, Church, Kerr & Company.
Alfred W. Bowie, Engineer in Charge."

To which Mr. Ford replied September 29, thus:

"GENTLEMEN: Your letter of the 28th inst. under file 1892-6, with respect to providing an engine and crew to take care of your business at the various camp sites.

Beg to state that this engine will be assigned to your work, [fol. 151] commencing Monday night and *you will be billed for for the use of the engine and crew, together with the cost of supplies, repairs, etc., plus ten per cent.*" (Italics added.)

The words italicized above are conclusive of the question. In fact, as stated above, it is not disputed that the consideration as determined by the contract is correctly assessed at the sum of \$7,533.50 in one case and \$5,765.43 in the other.

The effect of the Court's decision in the present case is thus to give the defendant a special privilege, to-wit, the benefit of the use of this engine and crew for its special service, over all other shippers and competitors without the payment of a real copper therefor. In other words, the Court has actually given the defendant a preference over other shippers during the time of this contract, a service valued by the parties themselves at the sum of \$13,298.93.

It is perfectly obvious that if these defendants are to be placed on equal basis with the other shippers—and equality among shippers is the object of the Interstate Commerce law—the defendants should be required to pay what this special service was worth. The Court calls attention to the fact that the equipment rental promulgated by the Company in the present case was 25% for supervision charge, while Mr. Ford in his letter (inadvertently no doubt) states it was 10%. If anything so far from the defendant being relieved from its contract altogether, it seems rather to be perfectly fair to the other shippers that the defendant should be required to pay the amount it undoubtedly agreed to pay and the additional sum sufficient to make up the 25% charge above mentioned. In any event, the defendants themselves recognized that it was right and just that they should be required to pay for the value of the engine and crew as provided for in the "equipment rental," and that is why they requested the assignment of the engine and crew "on the usual basis, billing us for cost of operation as you may elect."

Not only is it true, on principle, that the effect of the Court's decision is to require a violation of both the letter and spirit of the Interstate Commerce law, but the decision is undoubtedly opposed to the rulings of the United States Supreme Court and the former decision of the Virginia Court.

The cases referred to are:

[fol. 152] Chicago &c. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033.

Davis v. Cornwell, U. S. Adv. Ops. 1923-24, p. 473, decided April 21st, 1924.

C. & O. Ry Co. v. Ruckman, 115 Va. 493.

The Kirby Case decides that it is a violation of the law to give the shipper an expedited service for the line-haul rate, the Court saying (p. 163):

"The rates furnished the defendant in error (Kirby) were the regularly published rates. Those rates and schedules *did not provide for an expedited service* nor for transportation by any particular train. *Neither was Kirby required to pay any other or higher rate for the promised special service * * **" (Italics added.)

Accordingly the Court held that such a service for the line-haul rate was a preference to the shipper, and the agreement to furnish such special service without additional compensation void.

In the Cornwell Case, cited *supra*, and just recently decided, it was held that an absolute agreement to furnish a car to a shipper on a special date, a service unprovided for in the published tariffs, was an undue preference, and an action based on such a contract was unenforceable.

The Court said:

"The contract to supply cars for loading on a day named provides for a special advantage to the particular shipper, as much as a contract to expedite the cars when loaded. It was not necessary to prove that a preference resulted in fact. *The assumption by the carrier of the additional obligation was necessarily a preference.*" (Italics added.)

The Court further calls attention to the fact (no additional compensation for the additional service having been made)——

"The transportation service to be performed was that of common carrier under published tariffs; *not a special service under a special contract. * * **" (Italics added.)

And so in the Virginia Case of C. & O. Ry. Co. v. Ruckman, cited [fol. 153] *supra*, it was held that an expedited service given a shipper for the regular line-haul rate "makes a discrimination in his favor which is prohibited by the Interstate Commerce Act" and hence a contract for such a service is void.

Applying the doctrine announced in these cases to the case at bar: We find the Court in the present case holding in effect that it was the duty of the carrier to furnish the special service of an engine and crew to spot the defendant's cars, under the line-haul rate, no tariffs having been filed for additional compensation therefor. The precedent cases, however, hold the exact opposite to be true, viz.: that it is the duty of the carrier not to furnish the said special service under such circumstances for the line-haul rate.

But while the precedent cases thus hold that such special service cannot be performed for the line-haul rate, they do not hold that such special service could not be performed for additional adequate compensation. Indeed it is precisely the failure to charge for what additional service is worth that creates the preference and the pref-

erence thus created is precisely in proportion to the value of such additional service. And the Supreme Court of the United States in the recent Cornwell Case, cited supra, clearly indicates that "a special service under a special contract" is valid.

In fact, the sole remaining question, in the present case, is whether there was a common-carrier duty prohibiting the rental of the engine and crew to the defendant, and on this subject there appears to be no dispute that such rentals are valid——

Thus, in 10 C. J., p. 39, it is said:

"It is generally conceded that a common carrier may, under some circumstances act as a private carrier, and it has been held that a common carrier may become a private carrier when, as a matter of accommodation or special engagement, it undertakes to carry something which it is not its business to carry. 'In such a case it is dealing with matters involving ordinary considerations of contractual relations; those who chose to enter into engagements with it are not at a disadvantage and its stipulations even against liability for its own neglect are not repugnant to the requirements of its public service.' * * * There may be special engagements which are not embraced within its duty as a common carrier although their performance may incidentally involve the actual [fol. 154] transportation of persons and things, whose carriage in other circumstances might be within its public obligation."

Citing numerous cases.

In 4 Elliott on Railroads, p. 11, the author says:

"Where there is a right to refuse to perform the services requested, there is a right to contract for their performance in a different capacity from that which rests upon a railroad company as a public or common carrier."

(Italics supplied.)

In the earnest purpose to fully elucidate the question herein involved, petitioners desire to add the following remarks:

The traffic involved in this case was interstate, coming almost entirely from Florida and North Carolina; and is, of course, governed by the Interstate Commerce Act as interpreted by the Supreme Court of the United States. Recovery in this case was denied because,

"The service performed by the railroad employees with the railway equipment was the precise service which the company was then under immediate obligation to perform with reasonable promptness under the circumstances and for which it has already been paid. * * * There was no legal consideration for the promise relied on, and the trial court rightly determined that the railway company had no right to recover."

If, under the law, the service performed was not a service which the company was under obligation to perform, then it is respect-

fully submitted that the conclusions reached by the court must be wrong.

In 1912 the Kirby Case was decided by the Supreme Court of the United States (225 U. S. 155), and it was held *held* that notwithstanding it was the duty to carry and deliver the horses within a reasonable time, just as it was the duty of the railway company in the instant case to shift out and deliver cars to the defendant in a reasonable time, yet it was a violation of the Elkins Act, subject to a fine, for the railway company to agree for the time haul to [fol. 155] expedite the movement of the horses. In the instant case, it would have been a violation of the Elkins Act for the Railway Company, in consideration of the line haul, to assign a switch engine to the exclusive use of the defendant, and thereby give a preference in the delivery of defendant's cars over the cars of other consignees.

Following the decision above referred to, this court in the Ruckman Case, (115 Va. 493) held notwithstanding it was the duty of the Railway Company to furnish cars within a reasonable time upon request, yet it was illegal to agree to furnish a car by a particular date.

That this court was right in the Ruckman Case is shown by the case of Davis &c. v. Cornwell, Supreme Court Advance Opinions 1923-1924, p. 473, where the Supreme Court of the United States held that the contract to supply cars for loading on a day named provides for a special advantage to a particular shipper. A fortiori does the assigning of an engine and crew to one consignee, giving that consignee control of the same through the consignee's foreman and employees, surely gives that consignee a special advantage.

From the foregoing it is manifest that the Railway Company could not legally have done what the above quotation from the opinion says it was its obligation to do, namely, to devote an engine and crew to the special service of one consignee. Hence, it is that the defendant did not ask for an engine and crew to be assigned to do its work in consideration of the aggregate line haul, but asked that they be assigned to do the work of the defendant under its direction, and that the Railway Company bill the defendant for the cost of the operation, absolutely contradicting any idea that the cost was covered by the aggregate line haul.

Mr. Ford, the representative of the Railway Company, knew that he could not legally devote this engine to the special service of this defendant, but he also knew that he could assign or rent—it makes no difference what word is used—the engine to the defendant upon the cost as indicated in his letter, and therefore, in replying he said defendant "will be billed for the use of the engine and crew, together with the cost of supplies, repairs, etc., plus ten per cent," absolutely contradicting any idea that this business could be done under the aggregate line haul charge, that being an after thought after the work was done, in an effort to get rid of a just obligation. Had Mr. Ford undertaken, for the aggregate line haul, to devote this engine and crew to the work that they did, not only

[fol. 156] would this company be liable to a fine under the Elkins Act, but he himself for making such agreement, would be liable to have been sent to the penitentiary, and the recovery in this case seems to be denied on the ground that the Company was not doing that which it would have been punished for if it had done.

It is respectfully requested that further consideration be had of this case, especially in view of the fact that the Cornwell Case, decided on April 21, 1924, was not before the court when this opinion was prepared.

And as in duty bound your petitioner will ever pray, &c.

The Chesapeake & Ohio Railway Co. Walker D. Hines, Director General of Railroads, by Counsel.

Leake, Leake & Spicer, for the Petitioners.

IN SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Aug. 14, 1924

Upon the petition of plaintiff in error for a rehearing of the judgment of this court in this cause rendered on the 12th day of June, 1924.

The court having maturely considered the petition aforesaid is [fol. 157] of opinion that it should not be granted. It is therefore considered that a rehearing of this cause be denied.

A copy—Teste: J. M. Kelly, C. C."

IN SUPREME COURT OF APPEALS OF VIRGINIA

CLERK'S CERTIFICATE—Aug. 20, 1924

I, H. Stewart Jones, Clerk of the Supreme Court of Appeals of the State of Virginia, do hereby certify that the foregoing is a true and accurate copy of the record in the case of The Chesapeake and Ohio Railway Company v. Westinghouse, Church, Kerr & Company, Inc., on file and of record in my said office.

Witness my hand and seal of said court this 20th day of August, 1924.

H. Stewart Jones, Clerk. (Seal of the Supreme Court of Appeals of Virginia, Richmond.)

[fol. 158] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING PETITION FOR CERTIORARI—Filed October 27, 1924

On petition for writ of Certiorari to the Supreme Court of Appeals of the State of Virginia.

On consideration of the petition for a writ of certiorari herein to the Supreme Court of Appeals of the State of Virginia, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

[fol. 1] IN SUPREME COURT OF APPEALS OF VIRGINIA

WALKER D. HINES, Director General of Railroads, Operating the
Chesapeake & Ohio Railroad,

v.

WESTINGHOUSE, CHURCH, KERR & CO., INC.

PETITION FOR WRIT OF ERROR

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, Walker D. Hines, Director General of Railroads, operating The Chesapeake & Ohio Railroad, respectfully represents that he is aggrieved by a final judgment of the Circuit Court of the City of Richmond, entered on the 10th day of May, 1922, wherein a recovery was denied your petitioner and a judgment rendered for the defendant in a certain action of assumpsit brought by your petitioner against the Westinghouse, Church, Kerr & Company, Incorporated, a corporation, for \$6,816.52 for "services of engines and crews at Newport News, Virginia," during the months of January, February and March, 1918 (Rec., m. p. 4). While the above was the amount claimed in the account filed with the declaration, your petitioner sought to recover and asked judgment for only a part thereof, to-wit: the sum of \$5,765.43, as of April 1, 1918 (Rec., m. p. 50, 184).

[fol. 2] IN SUPREME COURT OF APPEALS OF VIRGINIA

STATEMENT OF THE CASE

Herewith presented is a transcript of the record from which it will appear that this case was heard by the Circuit Court of the City of Richmond, without a jury, along with the case of The Chesapeake &

Ohio Railway Company v. Westinghouse, Church, Kerr & Company, Inc., in which a petition for a writ of error is presented along with this petition. The evidence in both cases was identical, in as much as the same contract was involved in both suits; the only difference being that the suit of The Chesapeake & Ohio Railway Company v. Westinghouse, Church, Kerr & Company, Inc., was for the amount due under the contract prior to Federal control, while instant suit is for amount due under the same contract, which enured to the benefit of the Director General, after Federal control, which took place at midnight, December 31, 1917.

IN SUPREME COURT OF APPEALS OF VIRGINIA

ASSIGNMENTS OF ERROR

It is respectfully submitted that in the progress of the trial of this action, the learned Judge of the Circuit Court erred in the following particulars:

- (1) In entering up judgment for the defendant;
- (2) In refusing to enter up judgment for the plaintiff;
- (3) In admitting over objection of the plaintiff, certain statements of A. W. Bowie, a witness for the defendant, upon his cross-examination. (See Bill of Exceptions No. 2, m. p. 185); and
- (4) In refusing to set aside the judgment and award the plaintiff a new trial.

These are the identical Assignments of Error which were made in the companion suit. Your petitioner asks that the argument made in the Petition for Writ of Error in the companion suit be treated as a part of this Petition, and for the reasons therein set out, your petitioner prays for a Writ of Error herein, to be heard along with companion suit; that the judgment complained of may be re-[fol. 3] viewed and reversed, and that judgment be entered up for petitioner, in this court, for the amount claimed by him, with interest.

Respectfully submitted, Walker D. Hines, Director General of Railroad, Operating the Chesapeake & Ohio Railroad, by D. H. & Walter Leake, Sherlock Bronson, of Counsel. D. H. & Walter Leake, Sherlock Bronson, Meade T. Spicer, Jr., f. p.

We, counsel practicing in the Supreme Court of Appeals of Virginia, are respectfully of the opinion that there is error in the accompanying record and that the judgment complained of should be reviewed and reversed.

D. H. Leake, Sherlock Bronson.

Writ of error allowed. Bond \$250.

Robert R. Prentiss.

[Caption omitted]

[fol. 4] IN CIRCUIT COURT OF THE CITY OF RICHMOND

WALKER D. HINES, Director General of Railroads, operating the
Chesapeake & Ohio Railroad, Plaintiff,

vs.

WESTINGHOUSE, CHURCH, KERR & COMPANY, INC., Defendant

DECLARATION

Walker D. Hines, Director General of Railroads, operating the Chesapeake and Ohio Railroad complains of the Westinghouse, Church, Kerr & Company, Incorporated, a corporation, chartered under the laws of the State of Virginia, defendant, of a plea of trespass on the cause in assumpsit, for this, to-wit:

That heretofore, to-wit, on the 1st day of April, 1919, the said defendant was indebted to the said plaintiff in the sum of \$6,816.52 for the price and value of goods before that time sold and delivered by the plaintiff to the defendant at his special instance and request;

And also in the sum of \$6,816.52, for the price and value of work before that time done by the plaintiff for the defendant at his special instance and request;

And also in the sum of \$6,816.52, for money before that time lent by the plaintiff to the defendant at his special instance and request;

And also in the sum of \$6,816.52, for money before that time paid by the plaintiff for the use of the defendant at his special instance and request;

And also in the sum of \$6,816.52 for money before that time had and received by the defendant to the use of the said plaintiff.

And being so indebted, the said defendant, in consideration thereof, afterwards, to-wit, on the day, month and year last aforesaid, undertook and faithfully promised the said plaintiff to pay it, the said several sums of money in the above count mentioned, when the said defendant should be thereunto afterwards requested.

And for this also, that heretofore, to-wit: on the day, month and year last aforesaid, the said defendant accounted with the said plaintiff of and concerning divers other sums of money before that [fol. 5] time due and owing to the said plaintiff and then in arrears and unpaid and upon such accounting, the said defendant was found in arrear and indebted to the said plaintiff in the further sum of \$6,816.52 and being so found in arrear and indebted, he, the said defendant, in consideration thereof, undertook and then faithfully promised the said plaintiff to pay to it the said sum of money in this count last mentioned, when he, the said defendant, should be thereunto afterwards requested.

Yet the said defendant, not regarding his said several promises and undertaking hath not as yet paid to the said plaintiff the said several sums of money or any or either of them, or any part thereof, although often requested so to do; but to pay the same hath hitherto wholly neglected and refused and still doth neglect and refuse, to the damage of the plaintiff \$6,900.

And therefore it institutes this action of trespass on the case in assumpsit.

D. H. & Walter Leake, Sherlock Brosn, p. q.

IN CIRCUIT COURT OF THE CITY OF RICHMOND

[Title omitted]

AFFIDAVIT OF J. W. NOKELY

Richmond, Virginia, May 28, 1919.

Messrs. Westinghouse, Church, Kerr & Co., Inc., P. O. Box 848,
Newport News, Va., To the Chesapeake and Ohio Railroad, Dr.

For services of engines and crews at Newport News, Va. as follows:

Jany, 1918—Bill	\$437,370	\$2,826.01	
Feby. " "	437,372	2,035.36	
March " "	437,374	1,955.15	
			\$6,816.52

STATE OF VIRGINIA,
City of Richmond, To wit:

Personally appeared before me, Jos. E. Powers, a Notary Public [fol. 6] in and for the city aforesaid, in the State of Virginia, on this 10th day of July, 1919, in my said City, J. W. Nokley, who made oath that he is Assistant Federal Auditor and Agent of the Chesapeake and Ohio Railroad, operated by Walker D. Hines, Director General of Railroads, the plaintiff in this action; that to the best of affiant's belief the amount of plaintiff's claim is \$6,816.52; that said amount is justly due; and that the plaintiff claims interest on \$2,826.01, part thereof, from Feb. 1, 1918; on \$2,035.36 part thereof, from March 1, 1918, and on \$1,955.15, residue thereof, from April 1, 1918.

Given under my hand this 10th day of July, 1919.

Jos. E. Powers, Notary Public. My commission expires
January 12, 1921.

COUNTER AFFIDAVIT

VIRGINIA:

IN CIRCUIT COURT OF THE CITY OF RICHMOND

WALKER D. HINES, Director General of Railroads,

vs.

WESTINGHOUSE, CHURCH, KERR & COMPANY, INCORPORATED

AFFIDAVIT

STATE OF NEW YORK.

County of New York, To wit:

This day, in the County of New York, State of New York, Arthur K. Wood, personally appeared before me, Louis H. Reuter, a Notary Public, of and for the County aforesaid, in the State of New York, and made oath that he is an agent for the defendant in this action; and that the plaintiff is not entitled, as the affiant verily believes, to recover anything from the defendant on such claim.

A. K. Wood.

Subscribed and sworn to before me this 28th day of July, [fol. 7] 1919. In testimony whereof, I have herenuto set my hand and seal, the day, month and year aforesaid. Louis H. Reuter, Notary Public. Notary Public, New York County. N. Y. Co. Clerk's No. 228. N. Y. Co. Register's No. 10206. My commission expires on the 30th day of March, 1920.

IN CIRCUIT COURT OF THE CITY OF RICHMOND

[Title omitted]

PLEA OF NON-ASSUMPSIT

The said defendant, by its attorney, comes and says that it did not undertake or promise in manner and form as the plaintiff hath in this action complained. And of this the said defendant puts himself upon the country.

Westinghouse, Church, Kerr & Co., Inc., by Munford,
Hunton, Williams & Anderson, Counsel.

IN CIRCUIT COURT OF THE CITY OF RICHMOND

JUDGMENT—May 10, 1922

This day came again the parties, by their attorneys, and neither party demanding a jury for the trial of this case, but agreeing that

the whole matters of law and fact may be heard and determined and judgment rendered by the Court and the evidence and arguments of counsel being heard.

It is therefore considered by the Court that the plaintiff take nothing by its bill and that the defendant go thereof without day and recover against the plaintiff its costs by it about its defense in this behalf expended. The plaintiff, by its attorneys, moved the [fols. 8-140] Court to set aside said judgment and grant it a new trial, which motion the Court overruled. To which action and ruling of the Court the plaintiff, by its attorneys, excepted, and leave is given it to file its bill of exception.

Memorandum.—Upon the trial of this case the plaintiff, by its attorneys, excepted to sundry opinions and judgment of the Court given against it and leave is given it to file its bill of exceptions at any time within the time prescribed by law.

And afterwards, to-wit: At a Circuit Court of the City of Richmond held in the Court room of said City in the City Hall thereof on Saturday the 8th day of July, 1922.

This day came again the plaintiff, by its attorneys, and by virtue of the leave heretofore given it, this day filed its two bills of Exceptions herein and also filed a paper marked "Stipulations as to Record on Appeal," which said bills of exceptions and stipulations are ordered to be made a part of the record of the said trial.

Bill of Exceptions No. 1 et seq. are duplicates and are omitted in printing. See side pages 23-156.

[fol. 141] IN SUPREME COURT OF APPEALS OF VIRGINIA

CLERK'S CERTIFICATE—Aug. 20, 1924

I, H. Stewart Jones, Clerk of the Supreme Court of Appeals of the State of Virginia, do hereby certify that the foregoing is a true and accurate copy of the record in the case of Walker D. Hines, Director General of Railroad (Operating the Chesapeake and Ohio Railway Company) v. Westinghouse, Church, Kerr & Company, Inc. on file and of record in my said office.

Witness my hand and seal of the said court this 20th day of August, 1924.

H. Stewart Jones, Clerk. (Seal of Supreme Court of Appeals of Virginia, Richmond.)

[fol. 142] SUPREME COURT OF THE UNITED STATES

On Petition for Writ of Certiorari to the Supreme Court of Appeals
of the State of Virginia

ORDER GRANTING PETITION FOR CERTIORARI—Filed October 27, 1924

On consideration of the petition for a writ of certiorari herein to the Supreme Court of Appeals of the State of Virginia, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ..

(7217)



Supreme Court of the United States

No. —_____

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
PETITIONER,

vs.

WESTINGHOUSE, CHURCH, KERR & CO., INC.,

and

No. —_____

WALKER D. HINES, LATE DIRECTOR GENERAL
OF RAILROADS, PETITIONER,

vs.

WESTINGHOUSE, CHURCH, KERR & CO., INC.

PETITION FOR WRITS OF CERTIORARI.

*To the Honorable, the Supreme Court of the United
States:*

Petitioners, The Chesapeake & Ohio Railway Com-
pany, a common carrier, engaged in interstate com-

merce, and Walker D. Hines, late Director General of Railroads of the United States Railroad Administration (Act of Congress of March 3, 1923,) respectfully represent that they are aggrieved by judgments of the Supreme Court of Appeals of Virginia, the highest Court of the State of Virginia in which a decision can be had, entered on the 12th day of June, 1924 (rehearing refused on the 24th day of June, 1924), in two certain actions at law wherein petitioners, severally, were plaintiffs and plaintiff in error, and Westinghouse, Church, Kerr & Co., Inc., a corporation, was defendant and defendant in error. The cases were heard together, involved the same facts and were disposed of in a single opinion.

These actions, instituted in the Circuit Court of the City of Richmond, Virginia, were for amounts due on account of services rendered respondent by an engine and crew under a contract. Federal control intervening, the contract enured to the benefit of the Director General of Railroads and this necessitated the bringing of two actions. The amounts admittedly due under the contract were \$7,533.50, to the Chesapeake & Ohio Railway Company, and \$5,765.43 to the Director General of Railroads.

The actions were defended upon two grounds:

1. The service performed by the rented engine and crew was a service which the petitioners were under obligation to render under the "line-haul" freight charge under tariffs duly filed with the Interstate Commerce Commission, and, therefore, the contract was without a lawful consideration; and,

2. The contract for the rental of the engine and crew violated the Interstate Commerce Act, and a similar law of the State, forbidding undue preferences or special contracts for an expedited service.

The Supreme Court of Appeals disposed of the case on the first ground, and held the contracts void because the engine and crew were used "in the performance of a transportation service in spotting these cars, for which service the Company has been fully paid in the line-haul rate."

QUESTION INVOLVED.

The question involved is:

Whether a contract by a carrier for the rental to a shipper of an engine and crew, which are thereupon put under his exclusive control, is void, because the engine and crew are used by the shipper, at his own convenience, in the performance of a transportation service included in the "line-haul" freight charge.

The Supreme Court of Appeals, answering this question in the affirmative, held:

"Here the service performed by the railway employes with the railway equipment was the precise service which the company was then under immediate obligation to perform with reasonable promptness under the circumstances and for which it had already been paid."

The rentals of equipment by carriers for their convenience in switching and "spotting" service are of frequent occurrence, and are recognized by the Interstate Commerce Commission (61 I. C. C. 214).

The view of the Supreme Court of Appeals is opposed to that of the Commission which holds:

"No legal obligation, however, rests upon the carrier to perform switching and spotting service *solely at a shipper's convenience.*" (61 I. C. C., 214. Italics ours.)

The opposite of this is what the Supreme Court of Appeals necessarily decides in holding the contract void, since the service of the engine and crew here were un-

der the exclusive control of the shipper and conformable to his convenience at all times during the pendency of the engagement.

Substantially all the shipments handled by the engine and crew were interstate (Rec., p. 57);* the reliance was specifically upon tariffs filed under the Federal law as furnishing the supposed defence. (Rec., pp. 98, 99.)

Under decisions of this court it seems that carriers are permitted to enter into special contracts for this kind of service. (*Chicago R. I. & P. Co. vs. Maucher*, 248 U. S. 359; See *Davis vs. Cornwell*, decided April 21, 1924.)

The question here is of importance to carriers and shippers and public interests are accordingly involved.

Petitioners, therefore, pray for writs of *certiorari* (*Schaff vs. Famichon Co.*, 258 U. S. 76), and that the case be reviewed and the judgments reversed.

Certified copies of the records are filed herewith.

Respectfully submitted,

THE CHESAPEAKE & OHIO RAILWAY COMPANY
and
WALKER D. HINES, Late Director General of Rail-
roads,

By *David H. Peake*.....

Charles Peake.....

Abraham Simon
Heade T. Speer
.....
Counsel for Petitioners.

*References are to pages of the printed record in the C. & O. Ry. case. The evidence in both cases is the same but the paging of the records is not.

NOTICE OF SUBMISSION OF PETITION FOR
WRITS OF *CERTIORARI*.

To Westinghouse, Church, Kerr & Co., Inc.:

You are hereby notified that the undersigned will, on the day of October, 1924, at 12 o'clock noon, or as soon thereafter as counsel can be heard, submit to the Supreme Court of the United States, at Washington, a petition for writs of *certiorari*, copy of which, together with brief in support thereof, is hereto attached, to review judgments of the Supreme Court of Appeals of Virginia, entered on the 12th day of June, 1924, rehearings of which were refused on June 24th, 1924, affirming, upon writs of error, judgments of the Circuit Court of the City of Richmond, entered on the 10th day of May, 1922, in actions at law, heard together, wherein the undersigned were plaintiffs and you were defendant.

Respectfully,

THE CHESAPEAKE & OHIO RAILWAY COMPANY
and
WALKER D. HINES, Late Director General of Rail-
roads,

By

.....

.....

.....

Counsel for Petitioners.

ACKNOWLEDGMENT OF SERVICE OF NOTICE.

We hereby acknowledge legal service upon us of the foregoing notice and the accompanying petition and brief.

Given under our hands this.....day of.....
1924.

.....
.....
Counsel for Westinghouse, Church, Kerr &
Co., Inc., Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

Petitioners instituted severally actions at law in the Circuit Court of the City of Richmond, Virginia, to recover for sums due under a contract for the rental or leasing of an engine and crew at Newport News, Virginia.

There was a plea of a general issue and the causes were heard together, the evidence in both cases being the same. There was no contest as to amounts due, and the case was heard and decided by the Court without a jury. The trial court gave judgments for the defendant, to which writs of error were awarded from the Supreme Court of Appeals. That Court, in an order entered on the 12th day of June, 1924, affirmed the judgments. A petition for a rehearing was entertained but a rehearing denied on the 24th day of June, 1924.

Writs of *certiorari* are here sought on the ground that the decision of the Supreme Court of Appeals is in conflict with decisions of the Interstate Commerce Commission, and involves an erroneous construction of federal tariffs. At best the question is open for decision in this honorable court (*Davis vs. Cornwell, supra*), and is a matter of general interest.

STATEMENT OF THE CASE.

The following were the facts found by the Supreme Court of Appeals:

"Ignoring the conflicts in the testimony which have been determined in favor of the defendant, the pertinent facts are these: Westinghouse, Church, Kerr & Co., Inc., hereinafter called the contractors, entered into a contract with the United States Government for the construction of embarkation facilities at Newport News during the World War. Large quantities of material for use in such construction had arrived over the lines of the Chesapeake & Ohio Railway Company at Newport News, and there was great congestion there in the railway yards, because of this and of other activities there growing out of the war. This congestion is described by all of the witnesses as very great indeed and the railway company was clearly failing to deliver freight to the consignees within a reasonable time. The shipments here involved were in carloads, and these delayed cars were standing upon the tracks in the congested yard along with a great many cars for other consignees, so that the building operations were greatly impeded by these unreasonable delays in the delivery of such cars.

When the correspondence upon which these actions are based occurred, that condition is thus described: The contractor 'experienced more and more difficulty in obtaining the necessary service on the tracks; in other words, the C. & O. would have cars in their yard for a week or ten days or two weeks before they would deliver to us on our siding, principally through the lack of, as they put it, train crews or engine facilities or some other thing, so that we had very many conferences with Mr. Ford (superintendent of terminals at Newport News and later general superintendent at Newport News) with a view of eliminating this condition, and he finally stated to me that the only possibility of their being able to make these deliveries of material to us in

time to avoid delays in the construction work would be by assigning to us a locomotive. Meantime, we had had about a thousand cars received up to that time and a large part of the cars were buried in the storage tracks in the C. & O. yards, * * * .'

Under these conditions, after personal interviews, these letters passed:

'Newport News, Va.
September 28, 1917.

Chesapeake & Ohio Railroad Co.,
Newport News, Va.

Attention Mr. Ford, Supt. of Terminal.
1892-6.

Gentlemen:

Referring to our conversation with you to-day, we believe the switching problem is getting so heavy on account of the work at the various sites that it would be advisable for you to assign us an engine and crew on your usual basis, billing us for cost of operation as you may elect.

We would appreciate it if you would arrange for this engine and crew at the earliest possible moment, and also advise us if there is anything we can do towards helping out in furnishing a crew for this engine.

Yours very truly,

WESTINGHOUSE, CHURCH, KERR & COMPANY,

Alfred W. Bowie, Engineer in Charge.'

To which Mr. Ford replied September 29th, thus:

'Gentlemen:

Your letter of the 28th inst. under file 1892-6, with respect to providing an engine and crew to take care of your business at the various camp sites.

Beg to state that this engine will be assigned to your work, commencing Monday night and you will be billed for the use of the engine and crew, together with the cost of supplies, repairs, etc., plus ten per cent.'

Sidetracks for the delivery of carload shipments had been constructed from the main line of the railroad company into the camps which were being constructed. The contractor employed A. G. Quarles, a man of 28 years' railroad experience, who had been in the employment of the railway company, and for 17 years had acted as yard master at the Richmond yards; and put under him eight men, also their employees. At that time the conditions with the railway company at Newport News were such that apparently it was not only not able to deliver the cars, but was also unable to keep the records of the arrival and location of the cars for the various consignees. Under the direction of Quarles, these employees of the contractor were stationed in the yards and required to locate the cars consigned to the contractor, place tags or placards on them, indicating the siding upon which they were to be placed. The engine which, according to the claim of the railway company, was thus 'rented' to the contractor, and according to the claim of the contractor was thereby 'assigned' to it, was used to deliver for unloading these cars, estimated altogether during the period involved to be 6,500 in number, upon the switches or delivery tracks of the contractor—that is, it was used in railway vernacular, to 'spot' the cars. The immediate direction of the operation of this engine was by Quarles, the employee of the contractor, subject to the general direction and supervision of the yard master of the railway company in charge of the Newport News yard, and at night, when Quarles was off duty, the engine assigned to this work 'was operated under the immediate direction of the C. & O. yard master.'

The plaintiffs seek to recover rental for the use of the engine specially assigned to this work, and the bills are made up of a per diem charge, cost of materials used in the operation of the engine, the

wages of railway employees so engaged with an additional charge of ten per cent for supervision, claimed, except as to the supervision charge, to be in accordance with a circular of the railroad company covering such rentals of equipment. There was no tariff filed with the Interstate Commerce Commission or with the State Corporation Commission of Virginia, specifying such a rental, and the amounts which the plaintiffs seek to recover are independent of and in addition to rates for transportation service which are on file with each of the commissions.

The actions are defended on two grounds:

1. That the service performed by these engines was a service which the plaintiffs should have rendered under the aggregate line-haul charge paid on the freight, and that the supposed contract was without lawful consideration and void; and

2. That the contract violated the Interstate Commerce Act and the laws of the State of Virginia in such cases made and provided, and was, therefore, void and unenforceable.

To give proper consideration to these defenses, it is proper to consider the character of the service performed.

It is perfectly clear, under the tariffs on file, that the line-haul rates on these cars entitled the consignees to have them 'spotted' or placed upon these private delivery sidings to be unloaded. As expressed by the witness Ford, the consignee was entitled to one placement of the car 'on a track agreed upon by the railroad and the party owning the commodity, which would either have to be a general delivery, public delivery you might say, or a private industrial siding.' That this expresses the true construction of the applicable rate which was published and filed is conceded.

Ignoring the fact that an inconsequential num-

ber of these cars, not exceeding 25, were moved a second time because improperly spotted, (for which additional movement the railway company is entitled to a switching charge in accordance with the published tariff); these cars were placed on the delivery tracks of the contractor, and the obligation to do this without additional charge was clearly upon the railway company."

DECISION OF THE COURT.

The above being the facts found, the court held:

" * * * the service performed by the railway employees with the railway equipment was the precise service which the Company was then under immediate obligation to perform with reasonable promptness under the circumstances, and for which it had already been paid.

We do not think it necessary to consider any other feature of the case, for there is nothing which can vary or modify the result. There was no legal consideration for the promise relied on, and the trial court rightly determined that the railway company had no right to recover."

POINTS.

In the discussion of this case, your petitioners urge the following:

(1) No obligation rests upon a carrier, under the "line-haul" tariff rate, to furnish switching and "spotting" service solely at a shipper's convenience;

(2) The obligation to place or "spot" cars, under the line-haul tariff rate, does not contemplate the furnishing of special facilities to a shipper to meet abnormal and unprecedented conditions;

(3) The contract for the rental of the engine and crew did not constitute an undue preference or an illegal expedited service: on the contrary, the failure to exact compensation for this service has that effect.

ARGUMENT.

POINT I.

No obligation rests upon a carrier, under the line-haul tariff rate, to furnishing switching and spotting service solely at a shipper's convenience.

It is true that the great bulk of the work done by the engine and crew here was the switching and placing of cars, which the carrier was under obligations to do, under its tariffs, for no further consideration than the amount paid for the "line-haul" transportation of the carload. But the exclusive use of the engine and crew enabled the shippers to get other and better service than they could have had under existing conditions, since time and convenience are factors in the performance of all service. (Rec., pp. 33, 60, 61, 62, 74, 77, 84, 85, 97.)

So it has been held by the Interstate Commerce Commission, that "No legal obligation rests upon a carrier to perform switching and spotting service solely at a shipper's convenience." *Merchants Shipbuilding Corporation &c. vs. P. R. R. Co., et al.*, 61 I. C. C. 214. If the contract for the rent of the engine and crew here is to be held void for the reason suggested by the Supreme Court of Appeals, then the decisions of the Interstate Commerce Commission are necessarily erroneous.

Numerous cases have come before the Interstate Commerce Commission in which shippers have sought an allowance from carriers because the shippers have performed switching and "spotting" service, which the carrier was under obligation to perform under its tariff charges—but they have been uniformly disallowed, it being said to be well settled that the shipper is not entitled to an allowance from the carrier for a service which the

carrier is ready and willing to perform but which the shipper performs for his own convenience. 34 I. C. C. 609; 59 I. C. C. 29, 32; 61 I. C. C. 214.

This fixed principle seems to be conclusive of the question here, since if the argument advanced by the Supreme Court of Appeals in support of its conclusion here be sound, clearly the shipper would have been entitled to recover the rental of the engine and crew, had it been paid by him.

No distinction is perceived between services performed by a shipper with an owned engine and one that is rented.

POINT II.

The obligation to place or "spot" cars, under the "line-haul" tariff rate, does not contemplate the furnishing of special facilities to a shipper to meet abnormal and unprecedented conditions.

The Supreme Court of Appeals, in its decision, evidently overlooks the fact that while it is the duty of a carrier under its line-haul rate to once "spot" a car for a shipper, this duty is subject to the same duty which is owed to all other shippers at the same time and same place; and under the same conditions; and that consequently it is not the carrier's duty to furnish special facilities to spot cars for a special shipper. Such a shipper, so far as common-carrier duty is concerned, must bide his time along with all the other shippers, and wait for the placement of his cars in regular course. Moreover, since a common carrier is only under obligation to furnish facilities adequate for normal conditions, if abnormal and particularly if unprecedented conditions (such as undoubtedly prevailed in the present case) exist, the carrier is under no further duty than to use such facilities as it has at hand with such reasonable dispatch as these facilities will afford, and this,

too, with due regard to the equal rights of all the shippers respectively.

In *Pennsylvania R. Co. vs. Puritan Coal Co.*, 237 U. S. 121, 59 L. ed. 867, this court said:

“ . . . The carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made, and which it could not reasonably have been expected to meet in full.”

See Note to *Illinois, &c., R. Co. vs. River, &c., Co.*, 44 L. R. A. (N. S.) 646-650.

At the time of the transaction in question, the United States was engaged in a world-wide war. The nations were at Armageddon. There was a congestion of cars, equipment, traffic, freight, etc., along the ports of the Atlantic seaboard such as had never been seen before; and the record is replete with evidence that this was particularly true of the port at Newport News. It was, therefore, not pretended in the present case that the carrier, under the pressure of such a sudden and stupendous emergency, was under obligations to have supplied cars, equipment and furnished employees and facilities sufficient to transport and deliver shipments with the same dispatch as would be expected in normal times. Consequently, more than ordinary delays in the delivery of shipments were to be expected, and, in the regular course of business, were absolutely unavoidable.

It was precisely for the reason that if the defendant had waited for the delivery of its cars in the regular course of business (so far as common-carrier obligations were concerned) it could not have got the shipments with the same speed and facility with which the defendant desired to get them, that the defendants decided to hire an

engine and crew to "drill out" and place the cars for themselves.

Thus, Quarles, the director of operations and witness for the defendant, testified (Rec., p. 79):

"After being out there several days and working with the C. & O. yard men in order to get the material over, I found that we were not getting anywhere, we were not getting the material, it was impossible for the service to be performed as necessary to the amount of men that we employed to unload that material and to work it up as it was unloaded, and I stated to our traffic manager, Mr. Smith, 'I don't see but one way out of this; that will be for the C. & O. to assign us a special engine for my use entirely to handle our freight.'"

And Bowie, another witness for the defendant, testified that the reason the defendant asked for the locomotive in question was that "*the yard was entirely swamped; it was trying to handle more traffic than capable of doing.*" (Rec., p. 59.)

Accordingly the Westinghouse, Church, Kerr & Co., entered into a contract to rent the engine and hire the crew from The Chesapeake and Ohio Railway Company and the Director General of Railroads. It is undisputed that the contract was carried out. It is undisputed that the amount due the C. & O. Ry. Co. under this contract is \$7,533.50 as of December 21, 1917, and the amount due the Director General of Railroads is \$5,765.43, as of April 1, 1918.

The Supreme Court of Appeals adverted to the use in the contract of the word "assign," apparently attributing to it the consequence of an *allocation* of the engine and crew for the service described. The force of the suggestion is not perceived. Every rental of personal property is an *assignment* for a *consideration*; nearly every formal contract for a lease contains the word "assigns;" it is the technically correct

expression denoting the transfer of personal property. The real question is whether the property here involved was assigned for a consideration or not; and that the property was assigned for a consideration in the present case is put beyond dispute by the contract itself.

Thus, the letter of the defendant is as follows:

"Newport News, Va.
September 28, 1917.

Chesapeake & Ohio Railroad Co.,
Newport News, Va.

Attention Mr. Ford, Supt. of Terminal, 1892-6.

Gentlemen:—

Referring to our conversation with you today, we believe the switching problem is getting so heavy on account of the work at various sites that it would be advisable for you to assign us an engine and crew *on your usual basis, billing us for cost of operation as you may elect.* (Italics added.)

We would appreciate it if you would arrange for this engine and crew at the earliest possible moment and also advise us if there is anything we can do towards helping out in furnishing a crew for this engine.

Yours very truly,

WESTINGHOUSE, CHURCH, KERR & COMPANY,

Alfred W. Bowie, Engineer in Charge."

To which Mr. Ford replied September 29th, thus:

"Gentlemen:—

Your letter of the 28th inst. under file 1892-6, with respect to providing an engine and crew to take care of your business at the various camp sites.

Beg to state that this engine will be assigned to your work, commencing Monday night and *you will be billed for the use of the engine and crew, together with the cost of supplies, repairs, etc., plus ten per cent.*" (Italics added.)

The words italicised above are conclusive of the question.

In *United States vs. Interstate Commerce Commission*, decided May 26th, 1924, Mr. Justice Sanford observed of a contract then under consideration:

"Stress is laid on the assertion that there is no specific language in the contract, except in one instance, to the effect that the cars are leased. It is not necessary that there should be. In pursuance of the contract the cars were delivered to, operated and controlled and their use as instrumentalities of transportation paid for by the railroads. This is enough to establish a letting for hire; and there is nothing in the contracts or in any of the details of their performance which requires a different conclusion."

POINT III.

The contract for the rental of the engine and crew did not constitute an undue preference or an illegal expedited service: on the contrary the failure to exact compensation would have that effect.

A contract for the rent, for a consideration, of the engine and crew, is in no wise illegal under the Interstate Commerce Act.

"Where there is a right to refuse to perform the services requested, there is a right to contract for their performance in a different capacity from that which rests upon a railroad company as a public or common carrier."

4 Elliott on Railroads, p. 11.

If the carrier "was under no statutory or common law obligation to render the special service it was called upon to render there were no reasons of public policy which forbade the rendition of such service upon such terms as the parties might stipulate"—Mr. Justice Lurton in *Clough vs. Grand Central R. Co.*, 155 Fed. 81.

See *Santa Fe P. R. Co. vs. Grant Bros. Cons. Co.*,
228 U. S. 177, 185.

Chicago, &c., R. Co. vs. Maucher, 248 U. S. 359.

Compare *Davis vs. Cornwell*, *infra*.

Clearly the carrier could not be required to give to a shipper the exclusive use of an engine and crew and that is the identical service which he was enabled to get under the contract.

Indeed, if the question of a preferential or expedited service is here involved, the failure to exact payment for the engine and crew will constitute a preference since *respondent is thereby given a preference over other shippers during the term of this contract of a service valued by the parties themselves at the sum of \$13,298.93.*

Recovery in this case was denied, because, says the court:

“The service performed by the railway employees with the railway equipment was the precise service which the company was then under immediate obligation to perform with reasonable promptness under the circumstances and for which it has already been paid. * * * There was no legal consideration for the promise relied on, and the trial court rightly determined that the railway company had no right to recover.”

If, under the law, the service performed was not a service which the company was under obligation to perform, then it is respectfully submitted that the conclusion reached by the court must be wrong.

In the case of *C. & A. R. Co. vs. Kirby*, 225 U. S. 155, it was held that notwithstanding it was the duty to carry and deliver the horses within a reasonable time, just as it was the duty of the railway company in the instant case to shift out and deliver cars to the respondent in a reasonable time, yet it was a violation of the Elkins Act, subject to a fine, for the railway company to agree for the line-haul to expedite the movement of horses. In the instant case, it would have been a viola-

tion of the Elkins Act for the carrier, in consideration of the line-haul charge, to assign a switch engine to the exclusive use of respondent, and thereby give a preference in the delivery of defendant's cars over the cars of other consignees.

In *Davis, &c., vs. Cornwell, supra*, this court held that the contract to supply cars for loading on a day named provides for a special advantage to a particular shipper. A *fortiori* does the assigning of an engine and crew to one consignee, giving that consignee control of the same through the consignee's foreman and employees, surely give that consignee a special advantage.

From the foregoing it is manifest that the carrier could not legally have done what the above quotation from the opinion says it was its obligation to do, namely, to devote an engine and crew to the special service of one consignee. The respondent did not ask for an engine and crew to be assigned to do its work in consideration of the aggregate line-haul charge, but asked that they be assigned to do the work of respondent under its direction, and that the carrier bill respondent for the cost of the operation, absolutely contradicting any idea that the cost was covered by the aggregate line-haul charge.

The representative of the carrier who made the contract doubtless knew that he could not legally devote this engine to the special service of this defendant, but he also doubtless knew that he could assign or rent—it makes no difference what word is used—the engine to the respondent upon the cost as indicated in his letter, and, therefore, in replying he said respondent would be "billed for the use of the engine and crew, together with the cost of supplies, repairs, etc., plus ten per cent," absolutely contradicting any idea that this business could be done under the aggregate line-haul charge,—that being an after-thought on the part of the respondent, after the work was done, in an effort to get rid of a just obligation. Had the carrier's representative under-

taken for the aggregate line-haul charge to devote this engine and crew to the work that they did, not only would the carrier be liable to a fine under the Elkins Act, but he himself for making such an agreement, would be liable to have been sent to the penitentiary, and the recovery in this case seems to be denied on the ground that the carrier was not doing that which it would have been punished for if it had done.

To recapitulate, we find the Court in the present case holding in effect that it was the duty of the carrier to furnish the special service of an engine and crew to spot the defendant's cars, under the line-haul rate, no tariffs having been filed for additional compensation therefor. *The precedent cases, however, hold the exact opposite to be true, viz.: that it is the duty of the carrier not to furnish the special service under such circumstances for the line-haul rate.*

In what is said above it is assumed that the Act of Congress of August 29th, 1916 (34 Stat. at L. 584), requiring carriers to "facilitate and expedite" the military traffic is not controlling. If that Act controls, as was urged upon the Supreme Court of Appeals, then, of course, no question of preferred or expedited service arises, since in that view it was the duty of the carrier to "expedite" the military traffic, though, obviously it was not required to put its equipment at the disposal of the Government without consideration.

Respectfully submitted,

David A. Peake.....

Walter L. Latta.....

Frank B. Brown.....

Meade J. Spicer Jr.....
Counsel for Petitioners.



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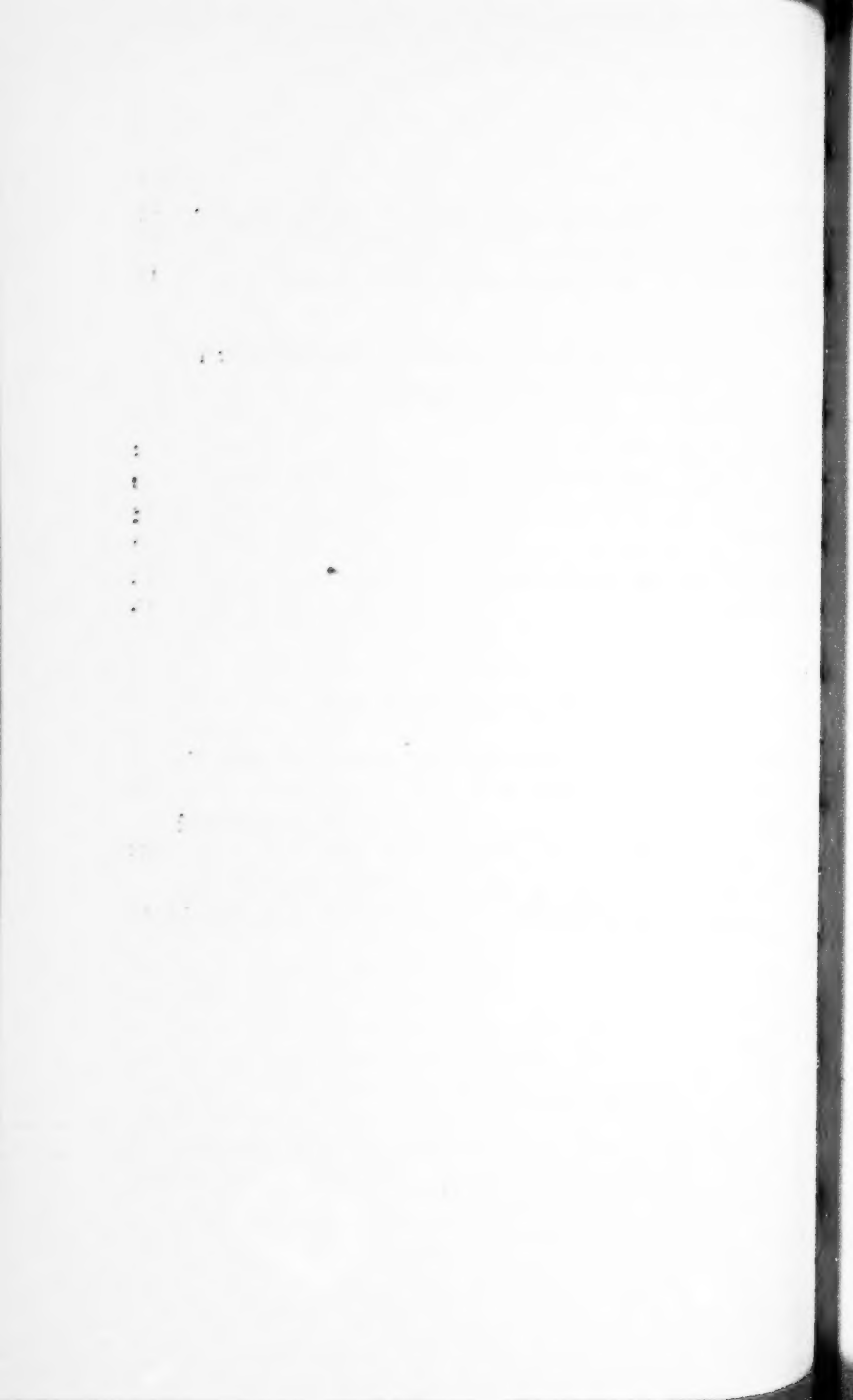
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 170.

THE CHESAPEAKE AND OHIO RAILWAY
COMPANY,

Petitioner,

vs.

WESTINGHOUSE, CHURCH, KERR & CO., INC.

No. 171.

WALKER D. HINES, LATE DIRECTOR
GENERAL OF RAILROADS,

Petitioner,

vs.

WESTINGHOUSE, CHURCH, KERR & CO., INC.

ON WRITS OF CERTIORARI TO THE SUPREME
COURT OF APPEALS OF THE STATE
OF VIRGINIA.

BRIEF FOR PETITIONERS

PRELIMINARY STATEMENT.

These are writs of certiorari awarded on October 27, 1924, (R., p. 132) to final judgments of the Supreme

Court of Appeals of Virginia, entered June 26, 1924, (R., p. 117), affirming judgments of the Circuit Court of the City of Richmond, denying a recovery of petitioners in actions at law for amounts due as rental for the services of an engine and crew under a contract. (R., p. 2.)

The identical contract was involved in both cases and they were tried together on the same evidence and were disposed of by the Supreme Court of Appeals in a single opinion (R., p. 112; 138 Va. 647). A petition for rehearing was entertained but a rehearing was denied on August 14, 1924. (R., p. 125.)

The necessity for two actions was brought about by the intervention of Federal control of the carrier.

GROUND OF JURISDICTION.

The lower courts declared the contract void because the service rendered respondent by the engine and crew was "the precise service which the Company [petitioners] was then under immediate obligation to perform" under interstate tariffs (R., p. 116, 117) upon which reliance was made as furnishing the supposed defence (R., pp. 187, 82). The shipments involved, with immaterial exceptions, were interstate (R. p. 47).

The holding involved a construction of interstate freight tariffs and the Interstate Commerce Act, believed to be erroneous and in conflict with rulings of the Interstate Commerce Commission.

The following decisions support the jurisdiction of

this Court, by certiorari, under Section 237 of the Judicial Code:

Davis v. Cornwell, 264 U. S. 560;

Kansas City Southern R. Co. v. Van Zant, 260 U. S. 459;

Schaff v. Famechon Co., 258 U. S. 76.

STATEMENT OF THE CASE.

Respondent, on August 16, 1917, after the declaration of war, contracted with the United States Government for the construction of embarkation facilities at the port of Newport News, Virginia. (R., p. 96.) The contract eventually included the construction of two embarkation camps: Camp Hill and Camp Stuart. The former was only a short distance from petitioner's tracks, and paralleled them for about a mile, while the latter was distant about three miles therefrom. (R., p. 19.)

The first part of September, 1917, respondent's representatives came to Newport News to commence work under the contract. Side tracks were forthwith constructed to these camp sites by the carrier in conjunction with respondent and a large number of tracks were constructed within the camps by respondent itself. (R., pp. 20, 21.) Prior to respondent's arrival at Newport News to carry out the contract with the government, construction material had been ordered and some of it was already on the yards of the carrier. (R., p. 45.) Thereafter, cars of material began to arrive in increasing quantities; they came in "at two ends of the town * * * over floats from Norfolk

and from Richmond through the north yards" (R., p. 45) and were arriving in "regular flocks" (R., p. 71) and at the rate of 200 or 300 cars a day (R., p. 46). Respondent's organization was enormous and they employed in their works, at one time, from 6,000 to 8,000 men (R., p. 56).

The facilities of the carrier were inadequate to meet this large increase of traffic thus suddenly thrust upon it.

At first the carrier was able to make satisfactory deliveries of the cars, but as the business increased respondent experienced "more and more difficulty in obtaining the necessary service on the tracks" (R., p. 45). "It was not a case of their [the carrier] not wanting to deliver; it was a case of being impossible to deliver * * *". (R., p. 46.)

Numerous conferences were held from time to time by representatives of the parties with a view of relieving the situation, participated in by the construction officers of the War Department (R., p. 71), and it developed that the only feasible way to give respondent the service it desired was by assigning a locomotive to it for its exclusive use in handling its shipments. (R., pp. 45, 65.)

Thereupon the following letters passed between the parties constituting the contract sued on (R., p. 2):

CORRESPONDENCE CONSTITUTING CONTRACT SUED ON.

WESTINGHOUSE, CHURCH, KERR & CO.,
INC.

ENGINEERS AND CONSTRUCTORS.

Newport News, Va.,
September 28, 1917.

Chesapeake & Ohio Railroad Co.,
Newport News, Va.

Attention Mr. Ford, Supt. of Terminal. 1892-6.
Gentlemen:—

Referring to our conversation with you to-day, we believe the switching problem is getting so heavy on account of the work at the various sites that it would be advisable for you to assign us an engine and crew on your usual basis, billing us for the cost of operation as you may elect.

We would appreciate it if you would arrange for this engine and crew at the earliest possible moment, and also advise us if there is anything we can do towards helping out in furnishing a crew for this engine. ✓

Yours very truly,
WESTINGHOUSE, CHURCH, KERR &
COMPANY,

Alfred W. Bowie, Engineer in Charge. ✓

AWB—JCC.

Newport News, Va.,
September 29, 1917.

Westinghouse, Church, Kerr & Company,
Newport News, Va.

Gentlemen:

Your letter of the 28th inst. under file 1892-6, with respect to providing an engine and crew to take care of your business at the various camp sites.

~~11/11/11~~
Beg to state that this engine will be assigned to your work, commencing Monday night and you will be billed for the use of the engine and crew, together with the cost of supplies, repairs, etc., plus ten per cent.

Yours very truly,
(Signed) E. I. Ford, Superintendent.

B.

✓ The letter of respondent asked that the engine and crew be assigned by the carrier on its "usual basis." The usual basis for such service is shown in a circular governing charges for "equipment rentals" (R., pp. 22, 23, 83). The bills for the service here were based on this circular, with the exception that a 10 per cent supervision charge was made instead of the 25 per cent for such charge, which was permissible under the circular. This was done in conformity with carrier's letter to respondent (R., p. 22) which was an inadvertence—but of course respondent has no complaint as to this.

Immediately after the correspondence an engine and a day and night crew were turned over to respondent and thereafter was under its exclusive direction and control (R., pp. 23, 49, 60, 62). Subsequently another engine and crew were assigned respondent on the same terms—but that transaction is not involved here (R., p. 25).

As originally intended, the engine was to supplement the carriers' service in delivering the cars on specified tracks, but this was found to be impossible and the "locomotive performance gradually grew up" (R., p. 46) and it was eventually used in picking out

respondent's cars from incoming trains and switching them in made-up trains to the camps and returning the empty cars to the carrier—that is, it performed what is technically known as “spotting” service (R., p. 46). Respondent furnished a yard master and clerks to assist in thus disposing of the traffic (R., pp. 47, 55).

Under the tariffs and what is known as the “standard terminal rule” filed with the Interstate Commerce Commission, the carrier was under obligation for the “line-haul” rate to make one placement of the carload shipment upon an industrial siding such as the sidings here involved (R., p. 82).

DEFENCES.

The actions were defended on two grounds:

1. The service performed by the rented engine and crew was a service which the petitioners were obliged to render under the “line-haul” freight charge fixed by tariffs duly filed with the Interstate Commerce Commission, and, therefore, the contract was without a lawful consideration; and

2. The contract for the rental of the engine and crew violated the Interstate Commerce Act, and a similar law of the State, forbidding undue preferences or special contracts for expedited services.

DECISION OF THE COURT.

The Supreme Court of Appeals disposed of the case on the first ground and held the contracts void because the engine and crew were used “in the performance of a transportation service in spotting these

cars, for which service the Company has been fully paid in the line-haul rate." (R., p. 116.)

SPECIFICATION OF ERROR AND SUMMARY OF ARGUMENT.

QUESTION INVOLVED.

The question involved is:

Whether a contract by a carrier for the rental to a shipper of an engine and crew, which are thereupon put under his exclusive control, is void, because the engine and crew are used by the shipper, at his own convenience, in the performance of a transportation service included in the "line-haul" freight charge?

The Supreme Court of Appeals, answering this question in the affirmative, held:

x // "Here, the service performed by the railway employes, with the railway equipment, was the precise service which the company was then under immediate obligation to perform with reasonable promptness under the circumstances and for which it had already been paid." (R., p. 116.)

The holding and decision complained of is thought to be erroneous and the contract is believed to have been in all respects valid and enforceable, according to its terms, for the following reasons:

POINTS.

- (1) No obligation rests upon a carrier, under the "line-haul" tariff rate, to furnish switching

and "spotting" service solely for the convenience of a shipper;

(2) The obligation to place or "spot" cars, under the line-haul tariff rate, does not contemplate the furnishing of special facilities to a shipper to meet abnormal and unprecedented conditions;

(3) The contract for the rental of the engine and crew did not constitute an undue preference or an illegal expedited service.

ARGUMENT

POINT I.

NO OBLIGATION RESTS UPON A CARRIER, UNDER THE "LINE-HAUL" TARIFF RATE, TO FURNISH SWITCHING AND "SPOTTING" SERVICE SOLELY FOR THE CONVENIENCE OF A SHIPPER.

Under the "line-haul" tariff rate for carload shipments and what is spoken of as the "standard terminal rule," filed with the Interstate Commerce Commission, the shipper is ordinarily entitled to one placement of a car, free of further charge, upon industrial sidings or spur tracks, such as involved here. (R., pp. 81, 82.)

The Commission has so held, with certain exceptions such as, for instance, "interior movement of plant traffic to and from various parts of the establishment and of deliveries through a system of interior switching tracks constructed as plant facilities." (*The Los Angeles Switching Case*, 234 U. S. 294, 18 I. C. C., p. 310; see 57 I. C. C. 677, 683.) However, it has been

frequently decided by the Commission that no legal obligation rests upon a carrier to perform "spotting" service of this character solely at a shipper's convenience.

In the case of *Pittsburgh Forge & Iron Co. v. Director General*, the Commission said (59 I. C. C., 29, 32):

"Defendants are under no legal obligation to spot cars for complainant solely at its convenience, nor are shippers entitled to an allowance from the carrier for service which the carrier is ready and willing to perform because it is not convenient for it to permit the carrier to perform the service."

In the case of *Downey Shipbuilding Corp. v. S. F. R. T. Ry. Co.*, the Commission said (60 I. C. C. 543, 548):

"Whatever transportation service or facility the law requires the carrier to supply they have the right to furnish, and it does not follow, therefore, even where the line-haul or terminal delivery rate covers the movement of cars incident to the receipt and delivery of carload freight on industry spurs, or on the interior tracks of industrial plants, that the owner of the property transported may in every case receive an allowance from the carriers when he elects to perform that service."

In *Merchants' Shipbuilding Corp. v. P. R. R Co.*, the Commission said (61 I. C. C., 214, 217):

"No legal obligation, however, rests upon the carrier to perform switching and spotting service solely at a shipper's convenience, and this, in substance, is what complainant desires. Further,

it is well settled that a shipper is not entitled to an allowance from the carrier for a service which the carrier is ready and willing to perform and which the shipper performs because it is not convenient for it to permit the carrier to perform."

The engine and crew here, after the making of the contract, were under the exclusive control of the respondent and conformable to its convenience at all times during the period the contract was in force (R., pp. 23, 49, 74, 82).

By this arrangement, respondent was enabled to get better and more expeditious service than would otherwise have been possible under existing conditions (R., pp. 26, 50, 64, 69, 79).

The Supreme Court of Appeals, in declaring the contract void for supposed want of consideration, necessarily held that respondent was entitled, under the tariffs, to the exclusive use of an engine and crew—which was the precise service it received. This holding we believe to be untenable and certainly at variance with the rulings of the Interstate Commerce Commission.

POINT II.

THE OBLIGATION TO PLACE OR "SPOT" CARS, UNDER THE "LINE-HAUL" TARIFF RATE, DOES NOT CONTEMPLATE THE FURNISHING OF SPECIAL FACILITIES TO A SHIPPER TO MEET ABNORMAL AND UNPRECEDENTED CONDITIONS.

The Supreme Court of Appeals, in its decision, evidently overlooked the consideration that while it is the duty of a carrier under its line-haul rate to once "spot" a car for a shipper, this duty is subject to the

same duty which is owed to all other shippers at the same time and same place; and under the same conditions; and that consequently it is not the carrier's duty to furnish special facilities to "spot" cars for a special shipper. Such a shipper, so far as common-carrier duty is concerned, must bide his time along with all other shippers, and wait for the placement of his cars in regular course. Moreover, since a common carrier is only under obligation to furnish facilities adequate for normal conditions, if abnormal and particularly if unprecedented conditions (such as undoubtedly prevailed in the present case) exist, the carrier is under no further duty than to use such facilities as it has at hand with such reasonable dispatch as these facilities will afford, and this, too, with due regard to the equal rights of all the shippers respectively.

In *Pennsylvania R. Co. v. Puritan Coal Co.*, 237 U. S. 121, 133, this court said:

"* * * The carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made, and which it could not reasonably have been expected to meet in full."

The effect of war conditions upon the obligations of carriers was considered by the Interstate Commerce Commission in *Waste Merchants Asso. v. Director General*, 57 I. C. C. 686.

In that case, it appeared that under the applicable tariffs carriers were under obligation to load and unload carload freight at New York.

In consequence of the congestion of traffic, labor conditions, and other circumstances due to the World War—occasioning great delays in the loading and delivery of freight—an arrangement was perfected between the carrier and the complaining shippers whereby the shippers undertook to do their own loading of cars and to relieve the carrier of that obligation.

The shippers subsequently filed a complaint with the Interstate Commerce Commission seeking an allowance under Section 15 of the Act.

The Commission, after adverting to the conditions under which the arrangement was made, said (p. 689):

“It is obvious * * * that the carriers did not fulfil their complete obligations under the tariffs during the prevalence of war conditions, and as a consequence the shippers were compelled to incur the expense of loading by means of their own employees. For the most part, however, had the shippers insisted on their right under the tariffs, their paper stock would have been received eventually, after long delays, along with other commodities and loaded by the carriers. Pursuing such a course, they would not have been able to ship nearly as much as they did, and the expense incident to the delays of trucks standing on long lines together with conveyances of other commodities for hours waiting to unload would have far outweighed the expense of loading the cars by their own employees. If deprived of some portion of the transportation service extended by the tariff, due to war conditions, these shippers received a consideration for such deprivation.

“The very undertaking by the carriers in their

tariffs to load carload shipments, as pointed out, is an exception to the general practice in favor of shippers at New York. There is no evidence to indicate that the rates or charges paid complainants shipments were excessive for the total transportation service actually rendered by the carrier, excluding loading.

"For any failure to observe their published tariffs the carriers may be answerable in another process. There was no alternate clause in defendant's tariffs providing for the payment of an allowance if the shipper performed the loading service and hence since all allowances to a shipper must be published in the tariffs, even if defendants desired they could not lawfully have compensated complainant's members for the loading service rendered by them. Nothing in the act requires that a shipper must be reimbursed for the transportation service that he may elect to perform primarily for his own convenience."

The Commission then quoted from Section 15 of the Interstate Commerce Act and continued:

"This provision is intended merely to provide against excessive allowances."

The Commission denied the relief prayed for and held that "under the circumstances, there was no obligation on the part of the carriers to make an allowance to complainant's members for the loading service."

At the time of the transaction in question here, the United States was engaged in a world-wide war. The nations were at Armageddon. There was a congestion of cars, equipment, traffic, freight, etc., along the ports

of the Atlantic seaboard such as had never been seen before; and the record is replete with evidence that this was particularly true of the port of Newport News. It was, therefore, not pretended in the present case that the carrier, under the pressure of such a sudden and stupendous emergency, was under obligations to have supplied cars, equipment and furnished employees and facilities sufficient to transport and deliver shipments with the same dispatch as would be expected in normal times. Consequently, more than ordinary delays in the delivery of shipments were to be expected, and in the regular course of business, were absolutely unavoidable. (R., pp. 46, 65).

It was precisely for the reason that if respondent had waited for the delivery of its cars in the regular course of business (so far as common-carrier obligations were concerned) it could not have got the shipments with the same speed and facility with which it desired to get them, that respondent decided to hire an engine and crew to "drill out" and place the cars for themselves.

Thus, Quarles, the director of operations and witness for respondent, testified (R., p. 65):

"After being out there several days and working with the C. & O. yard men in order to get the material over, I found that we were not getting anywhere, we were not getting the material, it was impossible for the service to be performed as necessary to the amount of men that we employed to unload that material and to work it up as it was unloaded, and I stated to our traffic manager, Mr. Smith, 'I don't see but one way out of this;

that will be for the C. & O. to assign us a special engine for my use entirely to handle our freight.' "

Bowie, another of respondent's witnesses, testified (R., p. 46):

"* * * the C. & O. was up against it, and it was not a case of their not wanting to deliver, it was a case of being impossible to deliver * * * while we were receiving two or three hundred cars a day, the government was receiving cars and we had to keep the tracks clear, otherwise there would be an embargo placed on Newport News and we couldn't get material past Richmond." * * *

POINT III.

THE CONTRACT FOR THE RENTAL OF THE ENGINE AND CREW DID NOT CONSTITUTE AN UNDUE PREFERENCE OR AN ILLEGAL EXPEDITED SERVICE.

(1) The contract, being one for a mere rental of equipment, was not a common-carrier service, and was in no wise illegal under the Interstate Commerce Act or otherwise.

"* * * where there is a right to refuse to perform the services requested, there is a right to contract for their performance in a different capacity from that which rests upon a railroad company as a public or common carrier."

4 *Elliott on Railroads*, 3rd ed., Sec. 2101, p. 463.

If the carrier "was under no statutory or common law obligation to render the special service it was called upon to render there were no reasons of public policy which forbade the rendition of such service upon such

terms as the parties might stipulate.”—Mr. Justice Lurton in *Clough v. Grand Central R. Co.*, 155 Fed. 81, 82.

In *Santa Fe, &c., R. Co. v. Grant Bros. Cons. Co.*, 228 U. S., 177, 185, Mr. Justice Hughes said, referring to the principle that a common carrier cannot contract against its negligence:

“Manifestly, this rule has no application when a railroad is acting outside the performance of its duty as a common carrier. In such case it is dealing with matters involving ordinary considerations of contractual relation; those who choose to enter into engagements with it are not at a disadvantage; and its stipulations even against liability for its own neglect are not repugnant to the requirements of public service. The rule extends no further than the reason for it. It is apparent that there may be special engagements which are not embraced in its duty as a common carrier, although their performance may incidentally involve actual transportation of persons and things, whose carriage in other circumstances might be within its public obligation.”

See *Chicago, &c. R. Co. v. Maucher*, 248 U. S. 359.

Compare *Davis v. Cornwell*, 264 U. S. 560, where the principle is referred to.

That the rental or letting out of equipment by carriers, for a special service as, for instance, to a circus, is not within ordinary common-carrier duties is recognized in *Chicago, &c., R. Co. v. Maucher, supra*, and has been so held in many decisions of State and Federal courts:

Clough v. Grand Trunk R. Co., supra;
Robertson v. Old Colony R. Co., 156 Mass. 525;
Coup v. Wabash, &c., R. Co., 56 Mich. 111;
Forepaugh v. Del., &c., R. Co., 128 Pa. 217;
Chicago, &c., R. Co. v. Wallace, 66 Fed. 506, 14
 C. C. A. 257;
Wilson v. Atlantic, &c., R. Co., 129 Fed. 774;
Yazoo & M. V. R. Co. v. Crawford, 107 Miss. 355;
Sager v. Northern Par. R. Co., 166 Fed. 526.

Clearly a carrier cannot be required by a shipper to give him the exclusive use of an engine and crew, and that is the identical service which respondent got here.

(2) If the question of a preferential or expedited service is here involved, it is believed the failure to exact payment for the engine and crew will constitute a preference, since *respondent is thereby given a preference over other shippers during the term of this contract of a service valued by the parties themselves at the sum of \$13,298.93.*

C. & A. R. Co. v. Kirby, 225 U. S. 155;
Davis v. Cornwell, supra.

Upon the facts shown in this record it seems clear that the failure to exact compensation from respondent for the use of the engine and crew would give it a special advantage over other shippers at the port of Newport News, during the period covered by the contract, and would constitute a preference under the *Kirby* and *Cornwell Cases*, assuming that the Act of Congress hereinafter cited does not apply.

It by no means follows from the above, as was contended, that this argument involves a concession that

the rental of the engine and crew was a common-carrier or transportation service. Preferences and discriminations, in violation of the Acts of Congress, may as well result from acts not within common-carrier duties or transportation service, as otherwise.

New Haven R. Co. v. Interstate Commerce Commission, 200 U. S. 361;

United States v. Union Stock, &c., Co., 226 U. S. 307.

(3) The record shows that the respondent was constructing embarkation facilities at Newport News for the government, in war time, on a contract for emergency work. (R., p. 96.) A large part of the shipments involved were ordered by the Construction Division of the War Department, and some of them were "military strictly" (R., pp. 71, 72). The construction officers of the War Department were urging the utmost expedition (R., p. 71). Furthermore, the cantonments under construction were for embarkation purposes—a purely military facility.

The contract upon which the suits are premised was one in which the government was vitally interested. Certain it is, that it concerned the "military traffic."

It follows then that the shipments handled by the leased engine were shipments for the United States Government of war materials in time of a national emergency.

In the preamble to the contract between the government and the construction company, it was recited, among other things, that:

"The Congress having declared by joint resolution, approved April 6, 1917, that war exists between the United States of America and Germany, a national emergency exists and the United States urgently requires the immediate performance of the work hereinafter described, and it is necessary that said work shall be completed within the shortest possible time." (R., p. 97.)

In view of these considerations, it was agreed between the government and the construction company that the work should be done "in the shortest possible time," and that it would begin the work specified at the earliest time practicable and diligently proceed so that such work be completed at the earliest possible date.

By an amendment to Section 6 of the Interstate Commerce Act, of August 29th, 1916 (39 St. at L. 604), it is provided:

"That in time of war or threatened war preference and precedence shall, upon demand of the President of the United States, be given over all other traffic for the transportation of troops and material of war, *and carriers shall adopt every means within their control to facilitate and expedite the military traffic.* And in time of peace shipments consigned to agents of the United States for its use shall be delivered by the carriers as promptly as possible and without regard to any embargo that may have been declared, and no such embargo shall apply to shipments so consigned * * *." (Italics supplied.)

It is apparent also that Section 3, paragraph (1) of the Interstate Commerce Act, forbidding carriers

from giving "any undue or unreasonable preference or advantage, to any particular person, company, firm, corporation, or locality, * * *" and other provisions *in pari materia* therewith, under which it was urged the contract between the Railway Company and the Construction Company was illegal—does not refer to such a preference or advantage given the government itself as was the case here (R., p. 80). A sovereign is not ordinarily amenable to laws made for its subjects. In order for such to be the case, there must be clear and unequivocal language by the law-making power to that effect. This is emphasized by the fact of the imposition of heavy penalties by the acts of Congress for their violation. Surely the government did not contemplate penalizing itself.

In the proclamation of the President assuming control of the railroads under authority of the Acts of Congress, effective at midnight, December 31, 1917, during the term of the contract here involved, such control was taken expressly for the purpose and "to the end that such systems of transportation be utilized for the transfer and transportation of troops, war material and equipment, *to the exclusion as far as may be necessary of all other traffic thereof*." (Italics supplied.)

A consideration of the facts of this case in the light of these Acts of Congress and the proclamation of the President in connection therewith, seems to us a conclusive answer to the contention of the respondent that it should be excused from the performance of its contract because it was the beneficiary of an "expedited" or preferential service thereunder, which it now claims to have been illegal.

Obviously, of course, it does not follow from the Act of Congress quoted that the carrier was required to put its equipment at the disposal of the government, without consideration.

CONCLUSION.

In conclusion it is urged that the judgments of the Supreme Court of Appeals are erroneous, for the reasons given, and should be reversed.

DAVID H. LEAKE,
WALTER LEAKE,
SHERLOCK BRONSON,
A. A. McLAUGHLIN,
Counsel for Petitioners.

APPENDICES.

SECTION 3, PAR. (1) OF INTERSTATE COMMERCE ACT, FEB. 4, 1887, C. 104, 24 STAT. AT L. 379:

That it shall be unlawful for any common carrier subject to the provisions of this Act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

SECTION 6, PAR. (8) OF INTERSTATE COMMERCE ACT, AS AMENDED AUG. 29, 1916, C. 417, 39 STAT. AT L. 604:

That in time of war or threatened war preference and precedence shall, upon the demand of the President of the United States, be given over all other traffic for the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic. And in time of peace shipments consigned to agents of the United States for its use shall be delivered by the carriers as promptly as possible and without regard to any embargo that may have been declared, and no such embargo shall apply to shipments so consigned.

**SECTION 15, PAR. (13) OF INTERSTATE COMMERCE ACT AS
AMENDED JUNE 29, 1906, C. 3591, 34 STAT. AT L. 584:**

If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

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IN THE

SUPREME COURT OF THE UNITED STATES

SCOTCHFIELD TERM, 1912

NO. 170 171

CHESAPEAKE & OHIO RAILWAY COMPANY,

Plaintiff,

vs.

WESTINGHOUSE, CHURCH, KEAR & COMPANY,
INC., Respondent.

and

WALKER D. HINES, LATE DIRECTOR GENERAL
OF RAILROADS, Plaintiff,

vs.

WESTINGHOUSE, CHURCH, KEAR & COMPANY,
INC., Respondent.

Case for Remedy in Question of Money and
Parties and Writ of Certiorari.

Wm. W. Anderson,

Plaintiff's Counsel.

By Counsel for Respondent.

Marion H. Hines, Plaintiff's Counsel.

Wm. W. Anderson,

Plaintiff's Counsel.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

Nos. 642 and 643.

CHESAPEAKE & OHIO RAILWAY COMPANY,
PETITIONER,
versus
WESTINGHOUSE, CHURCH, KERR & COMPANY,
INC., RESPONDENT,
and
WALKER D. HINES, LATE DIRECTOR GENERAL
OF RAILROADS, PETITIONER,
versus
WESTINGHOUSE, CHURCH, KERR & COMPANY,
INC., RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION TO MOTION AND
PETITION FOR WRITS OF CERTIORARI.

STATEMENT OF CASE.

While counsel for the petitioners in their brief in support of the petitions quoted at length the statement of facts as set forth in the opinion of the Supreme Court

of Appeals of Virginia, the essential facts of the cases for the purposes of this brief may be stated as follows:

The respondent in 1917 and 1918 was engaged in the construction at Newport News, Virginia, of certain embarkation facilities for the United States Government. Its construction material arrived at Newport News on the railroad of the petitioners. Side-tracks for the delivery of cars consigned to the respondent were constructed partly by the petitioners and partly by the respondent into the different camps at which the respondent was carrying on the Government's construction program. A few of the cars consigned to the respondent moved in intrastate commerce, but the vast majority of them moved in interstate commerce. During the period in question it is estimated that about 6,500 cars arrived at Newport News for the respondent, and in addition thereto a large number of other shipments were arriving daily for the Government, and for other activities at Newport News, arising out of and incident to the prosecution of the World War.

The yard of the petitioners at Newport News became congested, and their organization demoralized, with the result that great delay was experienced by the respondents, due to failure of the petitioners to make delivery of the cars on the sidings constructed and designated for the purpose. Cars consigned to the respondent were scattered throughout the yard, stored on the numerous sidings and spur tracks where they remained buried for periods varying from one to six or eight weeks.

Numerous conferences were held from time to time by the representatives of the respective parties, until the superintendent of terminals of the petitioners at Newport News stated to the superintendent of the respondent that the "only possibility of their (petitioners) being able to make these deliveries of material to us in time to avoid delays in the construction work would

be by assigning to us a locomotive. In the meantime, we had had about 1,000 cars received up to that time and a large part of the cars were buried in the storage tracks in the C. & O. Yards. * * * ”

At the suggestion of the superintendent of terminals of the petitioners, the respondent on September 28, 1917, addressed the following letter to the C. & O. Railroad Company:

“Newport News, Virginia, Sept. 28, 1917.

“Chesapeake & Ohio Railroad Co.,
Newport News, Va.

Attention Mr. Ford, Supt. of Terminal.
1892-6

Gentlemen:

Referring to our conversation with you to-day, we believe the switching problem is getting so heavy on account of the work at the various sites that it would be advisable for you to assign us an engine and crew on your usual basis, billing us for the cost of operation as you may elect.

We would appreciate it if you would arrange for this engine and crew at the earliest possible moment, and also advise us if there is anything we can do towards helping out in furnishing a crew for this engine.

Yours very truly,

WESTINGHOUSE, CHURCH,
KERR & COMPANY,

AWB/JJC

ALFRED W. BOWIE,
Engineer in Charge.

(Record, p. 101, Case 642.)

On September 29, 1917, the Railroad Company replied as follows:

“Newport News, Va., September 29, 1917.
File 133.

Westinghouse, Church, Kerr & Company,
Newport News, Va.

Gentlemen:

Your letter of the 28th inst., under file 1892-6 with respect to providing an engine and crew to take care of your business at the various camp sites.

Beg to state that this engine will be assigned to your work, commencing Monday night and you will be billed for the use of the engine and crew together with the cost of supplies, repairs, etc., plus ten per cent.

Yours very truly,

Superintendent

(Record, p. 102, Case 642.)

The tariffs under which both the intrastate and interstate cars moved provided, and in fact the petitioners conceded, that the respondent was entitled to one placement of each car on the siding designated for the purpose for the line-haul charge. The engine and crew assigned pursuant to the two letters quoted above were intended to be used, and were used, for the delivery of respondent's cars from the yards of the petitioners to the various sidings. The engine and crew operated in the day time under the immediate direction of a yardmaster employed by the respondent, subject to the general direction of the yardmaster of the petitioners, and at night the engine and crew operated under the immediate direction of the petitioners' yardmaster.

These actions were instituted by the petitioners to recover compensation for the use of the engine in addition to the line-haul charge provided by the tariffs lawfully on file. The amount sought to be recovered was based upon a rental circular of the petitioners. There

was no tariff authority, either intrastate or interstate, for the charge.

The respondent defended the actions on two grounds, namely:

(1) That the service performed by the engine was a service which the petitioner should have rendered under the aggregate line-haul charge paid on the freight, and that the contract was without lawful consideration and was, therefore, void; and,

(2) That the engine was a "transportation" facility and was used in a "transportation" service within the meaning of the Interstate Commerce Act and was violative of the Interstate Commerce Act and the laws of the State of Virginia in such case made and provided, and was, therefore, void and unenforceable.

The trial court rendered judgment for the respondent, which judgment, on appeal to the Supreme Court of Appeals of Virginia, was affirmed on the ground that *there was no legal consideration for the promise relied upon.*

The record presents no question reviewable by this Honorable Court, for which reason the petition for Writs of Certiorari should be denied.

By referring to the opinion of the Supreme Court of Appeals of Virginia (Record, pp. 139 to 145, Case 642) it will be observed that the state court did not determine the question whether the alleged contract was violative of the Interstate Commerce Act, and the corresponding provisions of the laws of the State of Virginia, but on the contrary, decided and disposed of the

case on the ground that there was no consideration for the alleged contract. The last paragraph of the opinion is as follows:

“We do not think it necessary to consider any other feature of the case, for there is nothing in the record which can vary or modify the result. *There was no legal consideration for the promise relied upon*, and the trial Court rightly determined that the Railroad Company had no right of recovery.” (Italics supplied.)

The defense that the alleged contract violated the Interstate Commerce Act involved a Federal question. The defense that the contract was without consideration did not involve a Federal question. The state court disposed of the case on the latter ground, and it is settled that if the decision of the state court on the non-federal question disposes of the case without involving the Federal question, then no right of review exists in this Honorable Court.

See:

Arkansas Southern R. R. Co. vs. German National Bank, 207 U. S. 270, 275.

Berea College vs. Kentucky, 211 U. S. 45, 53.

As observed above, it was conceded by the petitioners that the respondent was entitled to one placement of its cars upon the sidings. The state courts simply determined as a fact that the engine for which this additional compensation is claimed was assigned to and used in the performance of that service, and held upon common law principles that the contract was not supported by a legal consideration. For these reasons and upon the authority of the cases cited above, we submit that Writs of *Certiorari* will not lie under Section 237 of the Judicial Code to review the judgment of the Supreme Court of Appeals of Virginia.

The alleged contract is violative of the Interstate Commerce Act, and no Federal question is presented which has not been finally adjudicated by prior decisions of this Honorable Court.

The engine was not rented to the respondent for use by it in intraplant or interplant switching service at its convenience. On the contrary, the engine was assigned for the purpose of ferreting out the respondent's cars in the yard of the petitioners, and in making delivery of those cars upon the sidings constructed and designated for such delivery, and was so used. The engine crew were employees of the petitioners and reported to and were paid by the petitioners. The respondent merely employed an experienced railroad man whom it designated as its yardmaster to work with the engine in an endeavor to get delivery of the cars which the petitioners had utterly failed to deliver. Clearly, we submit, the service performed was a "transportation" service as defined by Section 1 of the Interstate Commerce Act, 24 Stat. L. 379, as amended by 34 Stat. L. 584, 36 Stat. L. 545. Likewise we submit it is clear that the engine was a "transportation" facility within the meaning of Section 6 of the Interstate Commerce Act, 24 Stat. L. 381, as amended by 25 Stat. L. 856, 34 Stat. L. 587.

See:

Cleveland & St. L. Ry. vs. Dettlebach, 239 U. S. 588, 593, 594.

Southern Railway Co. vs. Reid, 222 U. S. 424, 440.

Southern Railway Co. vs. Prescott, 240 U. S. 632, 637, 638.

The facility and service performed being, as we submit, a "transportation" facility and service, the peti-

tioners could not under the provisions of Section 6 of the Interstate Commerce Act,

“* * * charge or demand, or collect or receive a greater or less or different compensation * * * than the rates, fares and charges which are specified in the tariff filed and in force at the time. * * *”

There was no tariff on file providing for or authorizing the charge which the petitioners sought to collect in these actions.

If, as the petitioners contend, the facility furnished and service rendered was a facility and service in addition to that to which the respondent was entitled for the line-haul rate under the lawful tariffs on file, it was nevertheless a “transportation” facility and service, and therefore, could not lawfully be rendered in the absence of tariff provision therefor, as Section 6 of the Interstate Commerce Act specifically prohibits a carrier to “extend to any shipper or person any privileges or facilities in the transportation of persons or property, except such as are specified in such tariffs.” And it is settled by decisions of this Court that a contract to furnish a facility or service not provided for in a duly established tariff is void, and no action can be predicated thereon. Likewise, if, as the petitioners contend, the facility furnished and service rendered was a facility and service in addition to that to which the respondent was entitled for the line haul rate under the tariffs on file, it being nevertheless a “transportation” facility and service, the alleged agreement was, we submit, violative of Section 3 of the Interstate Commerce Act (24 Stat. L. 380), which makes it unlawful to make or give undue or unreasonable preferences and advantages to any shipper.

See:

Texas & Pacific Ry. vs. Abilene Cotton Oil Co., 204 U. S. 426.

Louisville & Nashville R. R. Co. vs. Motley, 219 U. S. 467.

Chicago & Alton R. R. vs. Kirby, 225 U. S. 155.

Atcheson, &c., Ry. Co. vs. Robinson, 233 U. S. 155.

Mitchell Coal Co. vs. Pennsylvania Railroad Co., 230 U. S. 247.

Pennsylvania Railroad Co. vs. Sonman Coal Co., 242 U. S. 120.

Southern Ry. Co. vs. Reed, *supra*.

Southern Ry. Co. vs. Prescott, *supra*.

United States vs. Texas & Pacific R. R. Co., 185 Fed. 820, 823.

We further submit that as under the line-haul rate the respondent was entitled to have its cars delivered upon the sidings constructed and designated for the purpose, this additional charge which the petitioners seek to collect is unjust and unreasonable, and is prohibited by Section 1 of the Interstate Commerce Act (24 Stat. L. 379, as amended by 34 Stat. L. 584, 36 Stat. L. 545), and is likewise violative of Section 2 of the Interstate Commerce Act (24 Stat. L. 379), which forbids a carrier to charge, demand, collect, or receive from any person a greater or less compensation for any service rendered in the transportation of property, subject to the provisions of the Act, than it charges, demands, collects or receives from any other person for a like or contemporaneous service in the transportation of like kind of traffic under substantially similar circumstances and conditions.

Points I, II and III of Petitioners' Brief considered.

The record, we submit, and the facts appearing in the "Statement of the Case," at page 7 of petitioners' brief clearly disclose that the engine and crew were not assigned to furnish "switching and spotting service solely at the shipper's convenience," as contended in Point I, at page 12 of petitioners' brief. As heretofore pointed out, the purpose of assigning the engine was to ferret out from the various sidetracks in the petitioners' yard cars which had arrived for the respondent and which had not been delivered, and to make delivery of such cars on the sidings constructed and designated for such delivery. The engines were used for that purpose, as found by the state court. The principle stated at page 12 of petitioners' brief, we submit, has no application to the facts of this case.

Under "Point II," at page 13 of petitioners' brief, it is contended that the obligation on the petitioners to make delivery of cars under the line-haul rate "does not contemplate the furnishing of special facilities to a shipper to meet abnormal or unprecedented conditions."

The respondent in this case is not seeking to recover an allowance from the petitioners for any service which the respondent may have performed in getting its cars delivered. On the contrary, the petitioners seek to recover a charge for a facility and service rendered in what they seem to concede to be a "transportation" service within the meaning of the Interstate Commerce Act, when there was no tariff on file authorizing such charge. For this reason we also submit the principle contended for in Point II of petitioners' brief has no application to this case.

The same is true of the contention made under Point III at page 17 of petitioners' brief. There it is contended that the failure to exact the compensation sought to be recovered in these actions constituted an undue preference or an illegal expedited service. At page 18 of petitioners' brief it is said:

"Indeed, if the question of a preferential or expedited service is here involved, the failure to exact payment for the engine and crew will constitute a preference since *respondent is thereby given a preference over other shippers during the term of this contract of a service valued by the parties themselves at the sum of \$13,298.93.*"

The petitioners in this point seem to concede that the service was a "transportation" service and contend that they will be guilty of giving a preference if they do not collect compensation. The rendition of a transportation service not provided for in the tariffs is in itself a preference, for which reason we submit that the petitioners' contention on this point cannot be sustained. The authorities cited under this division of petitioners' brief deal with agreements for non-carrier service not regulated by the Interstate Commerce Act, and, therefore, we submit, have no application to this case.

CONCLUSION.

In conclusion, we respectfully submit that, for the reasons hereinbefore stated, the judgment of the Supreme Court of Appeals of Virginia is not subject to review by this Honorable Court, that, so far as the defense that the alleged contract was violative of the Interstate Commerce Act is concerned, every question raised has been decided by this Court adversely to petitioners' contentions, and that, therefore, the petition for Writs of *Certiorari* should be refused.

Respectfully submitted,

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Office Supreme Court, U. S.
F I L E D

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SUPREME COURT OF THE
UNITED STATES

W. R. STANSBURY
CLERK

OCTOBER TERM, 1925.

No. 170.

THE CHESAPEAKE AND OHIO RAILWAY
COMPANY,
Petitioner,

vs.

WESTINGHOUSE, CHURCH, KERR & CO.,
INC.

No. 171.

WALKER D. HINES, LATE DIRECTOR
GENERAL OF RAILROADS,
Petitioner,

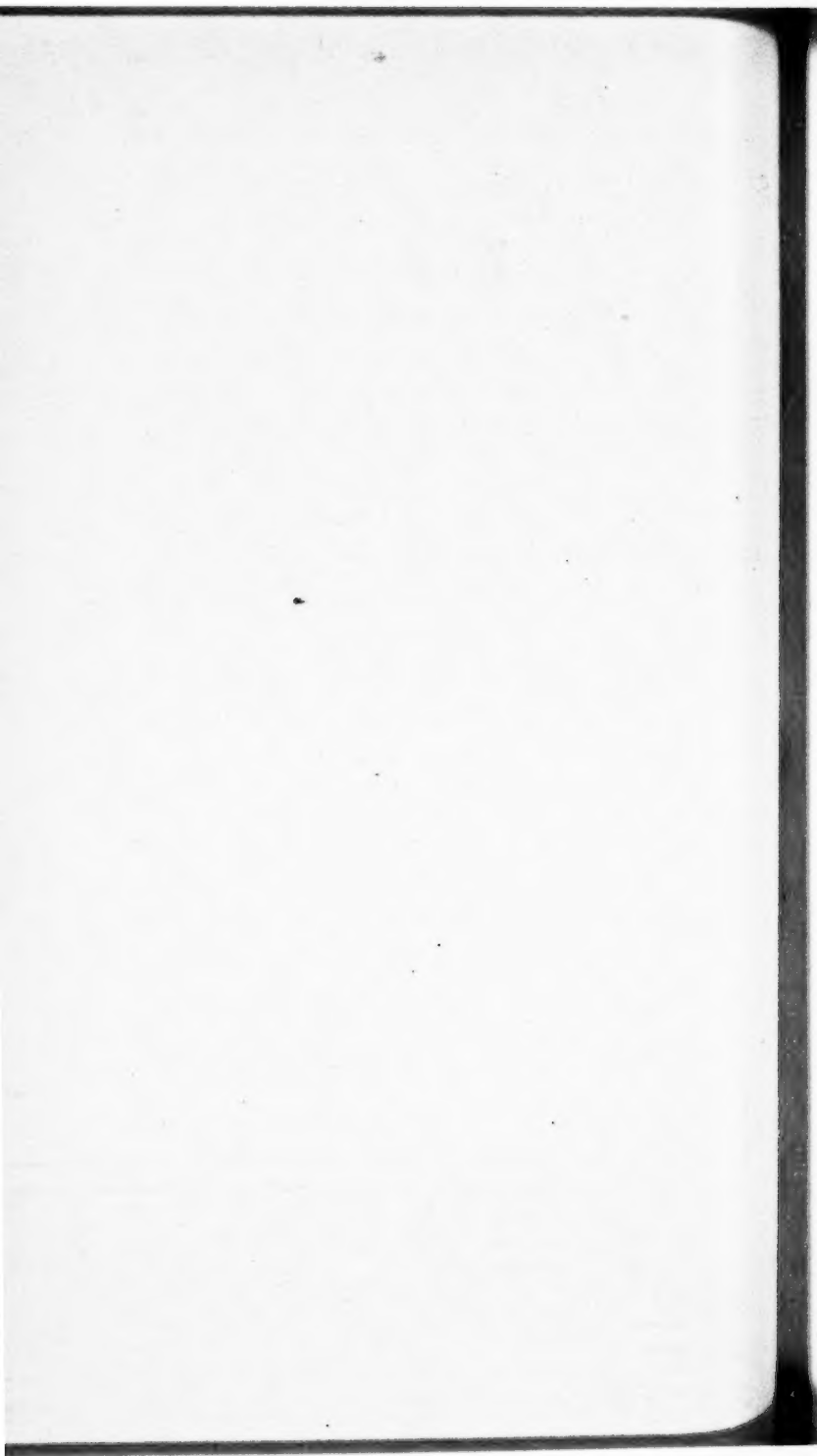
vs.

WESTINGHOUSE, CHURCH, KERR & CO.,
INC.

ON WRITS OF CERTIORARI TO THE
SUPREME COURT OF APPEALS OF THE
STATE OF VIRGINIA.

BRIEF FOR RESPONDENT.

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ON WRITS OF CERTIORARI TO THE
SUPREME COURT OF APPEALS OF THE
STATE OF VIRGINIA.

BRIEF FOR RESPONDENT.

PRELIMINARY STATEMENT.

These cases are before this Court on writs of
certiorari awarded on October 27, 1924, (R., p. 132),

to final judgments of the Supreme Court of Appeals of Virginia entered on June 26, 1924, (R., p. 117), affirming judgments of the Circuit Court of the City of Richmond, (R., pp. 130-131).

Identical issues were involved in both cases, and in the trial court a jury trial was waived and all matters of law and fact were submitted to the court for its decision. The trial court heard the cases together on the same record, and they were likewise heard on the same record and disposed of in a single opinion by the Supreme Court of Appeals of Virginia. (R., p. 112; 138 Va. 647.)

Both the trial court and the Supreme Court of Appeals of Virginia denied recoveries and entered final judgments for the respondent.

STATEMENT OF THE CASE.

A clear conception of the facts established in the Record is essential to a proper application of what we conceive to be the controlling law. The "Statement of the Case" appearing in the brief for petitioners, beginning at p. 3, is in our view both inadequate and in several particulars erroneous. We will, therefore, make a statement of the case in chronological order, and as briefly as a proper conception of the issues involved permits.

There was conflict in the testimony for the petitioners and the testimony for the respondent on two important points in the case. It is settled, however, under the law of the State of Virginia, that

the decision of the trial Judge which resolved those issues in favor of the respondent are as final and conclusive as the verdict of a jury would be. (R., p. 113; *F. W. Stock & Sons v. Owen*, 129 Va. 261.) This Court will not undertake a consideration and decision of conflicts in the testimony, but will accept the findings of facts by the State Courts as conclusive. See: *Interstate Amusement Co. v. Albert*, 239 U. S. 560, 566; *Waters-Pierce Oil Co. v. State of Texas*, 212 U. S. 86, 97.

Ignoring the conflicts in the testimony, which have thus been determined in favor of the respondent, the facts are as follows:

Shortly after the United States entered the World War, a military commission was sent to the vicinity of Hampton Roads to select a site for embarkation facilities. The City of Newport News, Virginia, and the Chesapeake & Ohio Railway Company hereinafter sometimes referred to as the "Railway Company," held out certain inducements for the location of the port at Newport News. The Railway Company promised to construct a side tract to the site considered at Newport News. Newport News was selected as the location for the port. (R., p. 70.)

The United States of America awarded the contract for the construction of the embarkation facilities at Newport News to the respondent. The contract was dated August 16, 1917, and provided for compensation to the respondent on a cost plus basis. (R., pp. 97, 100-101.)

The contract was an emergency contract, (R., p. 97), and while it was formally dated August 16, 1917, respondent was given advance notice of the award and proceeded at once in the performance thereof, including the purchase and shipment of material. (R., pp. 44-45.)

Major H. K. Love, Construction Quartermaster, representing the Government, and A. W. Bowie, the engineer of respondent in charge of the construction at Newport News, and the latter's subordinates, arrived at Newport News on July 30, 1917, and immediately began the construction under the award. (R., pp. 43, 70). At that time, material had begun to arrive over the Railway Company, the only railroad serving Newport News. (R., pp. 44-45.)

The line of railroad of the Railway Company entered Newport News from the north and ran through the city southwardly to the water front. The first construction undertaken under the award was Camp Stuart, which was located east of and about three miles from the railroad yards. Subsequently, the construction of Camp Hill, which was located on the west side of and parallel to the railroad, a large number of warehouses along the railroad adjacent to Camp Hill, warehouses at the old stevedore camp east of the railroad and north of Camp Hill, and other facilities for the needs of the Government, was undertaken under said award and contract. (R., p. 19.)

When the Construction Quartermaster and res-

pondent's Engineer arrived in Newport News on July 30, 1917, the Railway Company had not begun construction of the side track to the site selected for Camp Stuart, and the only space which the Railway Company had available for delivery of respondent's material was a spur track in the city of Newport News which had been used as a public delivery track and which had a capacity for the placement of only four cars at a time. (R., pp. 43, 70-71).

The Railway Company was immediately and repeatedly urged by the General in charge of the port, the Construction Quartermaster, and the respondent to construct the siding at the earliest possible date. It finally promised to have the siding ready for operation by September 1, 1917. The Railway Company did construct the siding from its main line to the entrance to Camp Stuart by September 1st. The respondent constructed that part of the siding located within the Camp and the siding was put in use on September 1, 1917. (R., pp. 20, 43, 71). In the meantime, respondent had to hire wagons and trucks to haul its material from the general delivery track to Camp Stuart, a distance of about three miles, all at the expense of the United States Government. (R., p. 71).

When the construction of Camp Hill and the warehouses was subsequently commenced, the necessary side tracks for delivery of material were constructed, partly by the Railway Company and partly by the respondent. The Railway Company

paid the cost of these sidings located on its right of way, and the respondent, and ultimately the Government of the United States, paid for the part of the sidings located on the Government property. (R., p. 21).

Before the siding into Camp Stuart was opened for use on September 1, 1917, large quantities of carload freight for construction purposes had arrived for the respondent, and large shipments of war material, supplies, etc., had arrived at Newport News for the Government. "The yards were filled up with cars for all the Government needs there, the military strictly as well as construction men, and so it ran along until it had just arrived at a hopeless stage." (R., p. 71).

After September 1, 1917, the Railway Company made deliveries under the line-haul rate to Camp Stuart on the siding which had been constructed (R., pp. 34-35, 48), but as the volume of freight increased the respondent

"* * * experienced more and more difficulty in obtaining the necessary service on the tracks; in other words, the C. & O. would have cars in their yard for a week or ten days or two weeks before they would deliver to us on our siding, principally through the lack of, as they put it, train crews or engine facilities or some other thing, so that we had very many conferences with Mr. Ford (the Railway Company's Superintendent of Terminals) with a view of eliminating this condition, and he finally stated to me that the only possibility of their

being able to make these deliveries of material to us in time to avoid delays in the construction work would be by assigning to us a locomotive." (R., p. 45.)

In the meantime, about a thousand cars had arrived at Newport News for respondent, "and a large part of the cars were buried in the storage tracks in the C. & O. yards * * *." (R., p. 45.)

By the middle of September, 1917, conditions in the Newport News terminal of the Railway Company had reached such a stage that the Railway Company was not only unable to make delivery of cars, but was unable to keep the usual records of arrival and location of cars for the various consignees. The Government was in urgent need of the facilities which respondent had under construction, and therefore respondent employed A. G. Quarles, a man of over twenty-eight years of railroad experience, who had been in the employ of the Railway Company as brakeman, fireman, conductor, yard master, and general yard master, and placed him in the yards of the Railway Company at Newport News in charge of eight men who were also in the employ of respondent. Quarles placed four of these men at the entrance to the Newport News yards from Richmond, Va., two in the Twenty-eighth Street yard, and two at the float where cars floated by the Railway Company from Norfolk to Newport News landed. These men worked in night and day shifts, and under the direction of Quarles checked up the bills on incoming trains and floats and placed large tags or placards on all cars arriving for respondent,

which cards indicated that the cars to which they were attached were respondent's cars, and designated the siding upon which the cars were to be placed. Whenever the yard men of the Railway Company saw this card on a car they knew the car belonged to the respondent, and also upon what siding it should be placed. (R., pp. 64-65.)

A record was kept by respondent's employees under Quarles of all cars which arrived for the respondent, and this was the only record of such cars. The Railway Company, for one reason or another, failed utterly to keep any accurate record of cars arriving in its terminal at Newport News. The Railway Company "did not keep track of cars coming in" and,

"The C. & O. men, themselves, were unable to locate cars by those track lists, and our material was scattered from the west end of the receiving yard down to the pier yard, that is, down to the river, and some of those cars had been in there since long before I got there, and some of them stayed in there for possibly two months after I got there before we could ever get to them, owing to the fact that cars were coming in all the time and it was impossible to get them to switch them out * * *." (R., p. 66.)

The result of these conditions was that cars loaded with material urgently needed by respondent for this Government construction were stored in various side tracks throughout the Railway Company's Newport News yards, and were being buried deeper

and deeper day by day, along with shipments arriving for other consignees. A large number of cars remained for weeks and months on the Railway Company's sidings, where they had been stored by the Railway Company, instead of being delivered to meet the urgent needs of the Government in this construction work. (See testimony of Bowie, R., pp. 44 to 49; of Seymour, R., pp 54 to 57; of Quarles, R., pp. 65 to 67; and of Major Love, Construction Quartermaster for the Government, R., pp. 71 to 73.)

By the latter part of September, 1917, conditions had reached such a stage that some action had to be taken to get delivery of respondent's shipments, in order that the construction work might proceed. Again conferences were held by the respondent's representatives and the Railway Company's superintendent. *The superintendent of the Railway Company stated the only possible way for the Railway Company to make deliveries of these shipments would be to assign a locomotive for the purpose.* (R., p. 45.) *The Railway superintendent's "point was, if we (respondent) had a locomotive assigned to our work and our work alone we would have more or less control over it and it would be, as he expressed it, a handy alibi to the other fellow who wanted a car placed."* (R., p. 45.)

The Railway Company's superintendent asked that request for the assignment of a locomotive for the handling of respondent's shipments be made in writing, and pursuant to this request respondent's engineer, on September 28, 1917, wrote the Railway

Company a letter "couched in about the words he (the Railway Company's superintendent) suggested. (R., p. 46). This letter, (R., p. 2), was as follows:

"WESTINGHOUSE, CHURCH, KERR &
CO., INC.

ENGINEERS AND CONSTRUCTORS.

Newport News, Va.,
September 28, 1917.

Chesapeake & Ohio Railroad Co.,
Newport News, Va.

Attention Mr. Ford, Supt. of Terminal.
1892-6.

Gentlemen:—

Referring to our conversation with you to-day, we believe the switching problem is getting so heavy on account of the work at the various sites that it would be advisable for you to assign us an engine and crew on your usual basis, billing us for the cost of operation as you may elect.

We would appreciate it if you would arrange for this engine and crew at the earliest possible moment, and also advise us if there is anything we can do towards helping out in furnishing a crew for this engine.

Yours very truly,

WESTINGHOUSE, CHURCH, KERR &
COMPANY,

Alfred W. Bowie, Engineer in Charge."

On September 29, 1917, the Railway Company's superintendent replied, (R., p. 3), as follows:

"Newport News, Va.,
September 29, 1917.

Westinghouse, Church, Kerr & Company,
Newport News, Va.

Gentlemen:—

Your letter of the 28th inst. under file 1892-6, with respect to providing an engine and crew to take care of your business at the various camp sites.

Beg to state that this engine will be assigned to your work, commencing Monday night and you will be billed for the use of the engine and crew, together with the cost of supplies, repairs, etc., plus ten per cent.

Yours very truly,

(Signed) E. I. Ford, Superintendent."

Pursuant to these conferences and letters, the Railway Company assigned an engine and crew to the work of switching in its yards and delivering on the side tracks the cars which had arrived and were arriving for respondent. This engine operated during the daytime, but later another engine was assigned for night operation. The engines were the property of the petitioners, all supplies used by them were furnished by the petitioners, all repairs were made by the petitioners, they were stored by the petitioners when not in use, and were operated by a crew in the employ of the petitioners, and paid by them. The immediate direction of the operation of these engines was by Quarles, an employee of the respondent, when on duty, subject to the general direction and supervision of the petitioners' yard master in charge of the Newport News yards,

and when Quarles was off duty the engines were "operated under the immediate direction of the C. & O. yardmaster." (R., pp. 67-68.)

The bulk of the cars received for the defendant and handled by these engines moved interstate. A few of the cars were intrastate shipments. (R., p. 47.)

The engines so assigned to this work were used in ferreting the cars out of the sidings *in the petitioners' yards* where they had been stored for weeks and months, in breaking up trains in the petitioners' receiving and classification yards upon arrival at Newport News, in classifying the cars so arriving, in assembling respondent's cars on classification tracks designated by petitioners for the purpose, in delivering the cuts of cars so classified onto the sidings constructed for delivery of cars at Camp Stuart, Camp Hill, the warehouses and the stevedore camp, and in pulling out the empty cars and classifying them in the petitioners' yards for the return movement. These engines performed the entire terminal service which the petitioners were obligated to perform *quoad* the respondent's cars, and in a few instances performed a like service with respect to cars for other consignees. *The engines were not used for an intra-plant or inter-plant switching service or for a mere spotting service for the convenience of the respondent*, and the State court so held. (R., pp. 46-47, 51, 56-57, 66-69, 71-72, 112.)

The tariffs on file with the Interstate Commerce Commission and with the State Corporation Com-

mission of Virginia provided, and petitioners conceded, that the line haul rate entitled respondent to one placement of each of its cars on the sidings in these camps. (R., pp. 82, 26, 29-30, 33-35.) As stated above, and as the State courts found, it was this service which these engines performed.

Petitioners had no tariff on file with either the Interstate Commerce Commission or the State Corporation Commission of Virginia authorizing the so-called "rental charge" for these engines which they seek to recover in these actions. The charges are based upon a schedule of equipment rentals adopted by the petitioners which was not a part of their tariffs, and of which respondent had no knowledge. (R., pp. 22, 23, 83-85.) The special assignment of the engines was terminated on March 30, 1918. (R., p. 85.) No bills were rendered by petitioners to the respondent until after the work was practically completed, when the Railway Company rendered its bill for the period prior to Federal control, that is, the months of October, November, and December, 1917, (R., p. 86 *et seq.*), and the Director General rendered his bill for the period subsequent to the beginning of Federal control, that is, for the months of January, February, and March, 1918, (R., p. 91 *et seq.*). When the bills were rendered and submitted to the Construction Quartermaster representing the War Department, he refused to allow them as a proper charge. (R., p. 73.) Therefore, these actions were instituted to recover the respective amounts claimed.

DEFENSES.

These actions were defended on two grounds:

1. That the alleged contract under which petitioners seek to recover the so-called rental charges is violative of both the Interstate Commerce Act and the Elkins Act, and the corresponding provisions of the statutes of the State of Virginia, and is, therefore, null and void.

2. That the services performed by these engines and crews were services which the petitioners were obligated to render under the line-haul freight charge fixed by tariffs duly filed, that the alleged contract was, therefore, without a lawful consideration and is null and void.

The Supreme Court of Appeals of Virginia did not decide the question raised by the defense first mentioned, but disposed of the cases on the ground that "the service performed by the railway employees with the railway equipment was the precise service which the company was then under immediate obligation to perform with reasonable promptness under the circumstances and for which it has already been paid," and that, therefore, "there was no legal consideration for the promise relied on, and the trial court rightly determined that the railway company had no right to recover." (R., p. 116-117).

SPECIFICATION OF ERROR AND SUMMARY OF ARGUMENT.

QUESTION INVOLVED.

Under the above caption, petitioners' counsel, at page 8 of their brief, state the question involved to be:

"Whether a contract by a carrier for the rental to a shipper of an engine and crew, which was thereupon put under his exclusive control, is void, because the engine and crew are used by the shipper, at his own convenience, in the performance of a transportation service included in the 'line-haul' freight charge?"

The foregoing quotation from petitioners' brief, (1) assumes facts which are not established by the record, and (2) does not, in our opinion, correctly state the question involved.

FIRST. While the charges sought to be collected are referred to in the record as "rental," and while the schedule of charges upon which these claims are based is designated "equipment rentals", (R., p. 83), not a word passed between petitioners and respondent as to the "rental" of the engines. Respondent's letter of September 28, 1917, requested the Railway Company "to assign us an engine and crew on your usual basis" and the letter of September 29, 1917, from the Railway Company to respondent stated the "engine will be assigned

to your work." (R., pp. 2-3.) Respondent's representatives had no knowledge of the rental circular. We submit it clearly appears that this was not a rental of equipment, but an assignment of equipment to this particular transportation service, and that the petitioners had the right to withdraw the equipment at any time, subject, of course, to their obligation to make deliveries of the cars.

SECOND. It clearly appears, we submit, that the engines were not under the "exclusive control" of respondent. On the contrary, we have shown in our statement of the case that the engines were operated by crews employed and paid by the petitioners, under the immediate direction of Quarles, an employee of respondent, when on duty, but under the general supervision of petitioners' yard master, and under the immediate supervision of petitioners' yard master when Quarles was off duty. (R., pp. 67-68.) The State court so found. (R., p. 114).

THIRD. We submit we have shown in our statement of the case that the engines were not assigned to this work to subserve the "convenience" of respondent in an intra-plant or inter-plant switching or spotting service, or otherwise, but for the purpose of performing a transportation service which petitioners were under obligation to perform, and for which they were paid. The State court so held. (R., pp. 116-117).

FOURTH. The Federal questions involved are these:

A. Whether the engines so assigned, and the services performed thereby, were "transportation" facilities and services within the purview of the Interstate Commerce Act?

B. If so, is the alleged contract violative of the Interstate Commerce Act, and, therefore, null and void?

C. As the alleged agreement was violative of, and void under, the laws of the State of Virginia *quoad* intrastate shipments, and as the alleged consideration is indivisible, can there be a recovery in any event?

D. Is the alleged agreement supported by a legal consideration?

We will discuss the case in the above aspects, and make reply to the argument advanced on behalf of the petitioners.

ARGUMENT

I.

THE FACILITIES FURNISHED AND SERVICES PERFORMED WERE A PART OF "TRANSPORTATION" AS DEFINED BY THE INTERSTATE COMMERCE ACT.

The term "railroad" is defined by Sec. 1, par. (2) of the Interstate Commerce Act, (See Appendix, *post*, p. 44), to include not only the main line of the railroad, but "all switches, spurs, tracks and terminal facilities of every kind used or necessary

in the *transportation*" of persons or property, "and also all freight depots, yards, and grounds used or necessary in the *transportation* or *delivery*" of said property.

The same paragraph of Sec. 1, defines the word "transportation" as used in the Act to include "cars and other vehicles and all instrumentalities and facilities of shipment or carriage . . . and all services in connection with the receipt, *delivery* . . . storage, and handling of property transported."

In construing these and other provisions of the Interstate Commerce Act, this Court in the case of *Cleveland, etc. Railway Company v. Dettlebach*, 239 U. S. 588, at pages 593-4 said:

"And this is quite in line with the letter and policy of the Commerce Act, and especially of the amendment of June 29, 1906, known as the Hepburn Act (34 Stat. 584, c. 3591), which enlarged the definition of the term 'transportation,' (this, under the original act, included merely 'all instruments of shipment or carriage') so as to include 'cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof *and all services in connection with* the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration, or icing, *storage*, and hauling of property transported;"

"From this and other provisions of the Hepburn Act it is evident that Congress recognized

that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as interstate carriers by rail were concerned the entire body of such services should be included together under the single term 'transportation' and subjected to the provisions of the Act respecting reasonable rates and the like."

And in the case of *Southern Railway Company v. Reid*, 222 U. S. 424, this court at page 440 said:

"And transportation means not only the physical instrumentalities, *but all services in connection with receipt, delivery and handling of property transported.*" (Italics ours).

See also:

Southern Railway Company v. Prescott, 240 U. S. 632, 637-8.

Pennsylvania Railroad Co. v. Lowman Shaft Coal Co., 242 U. S. 120, 122.

That it was the duty of petitioners to make delivery of respondent's cars on the sidings provided for the purpose is not controverted. In fact, petitioners admit that respondent was entitled to one placement of each car upon these sidings for unloading. Before the engines were especially assigned, and after the special assignment was terminated, the petitioners made delivery of respondent's cars on

the sidings under the line-haul rate, and without special charge. This it was obligated to do.

In *United States v. Texas and Pacific Railroad Company*, 185 Fed. 820, the court at page 823 said:

"A carrier has a duty to fulfil under the law, when it accepts a shipment of freight, and that is to transport it from the point of origin and carry it to destination and put it in the customary place of delivery for the consignee at the point of destination. And until it complies with that duty its liability as a common carrier remains. (Italics ours.)"

The facilities furnished by the petitioners were engines and crews especially assigned to the work in the yards of the railroad at Newport News of breaking up trains as they arrived, placing respondent's cars upon the tracks assigned for them in the classification yard, drilling out respondent's cars from the numerous tracks of the petitioners upon which they had stored them, placing those cars upon the tracks in the classification yard, making delivery of the cars thus classified upon the respective sidings constructed jointly by the Railway Company and the respondent for the specific purpose of making delivery to respondent, in taking out the empties from the sidings after the cars had been unloaded, and in performing the general service which every common carrier performs in making delivery of freight. The case is not one in which railroad equipment is withdrawn from the transportation service and devoted to a non-transportation service, such as an intraplant switching service.

We submit it is clear that the engines and crews assigned and the services performed thereby were transportation facilities and services clearly within the definition of the word "transportation" as defined in Sec. 1, par. (2) of the Interstate Commerce Act, and that this Court has so decided in the foregoing cases.

II.

THE FACILITIES FURNISHED AND SERVICES PERFORMED BEING "TRANSPORTATION" FACILITIES AND SERVICES, THE PETITIONERS VIOLATED SECTIONS 3 AND 6 OF THE INTERSTATE COMMERCE ACT AND SECTION 1 OF THE ELKINS ACT, IF THE FACILITIES AND SERVICES WERE IN ADDITION TO THOSE PROVIDED FOR IN THE LAWFULLY FILED TARIFFS.

Sec. 6, par. (1) of the Interstate Commerce Act (see Appendix, *post*, p. 46), requires common carriers to file with the Interstate Commerce Commission schedules of their rates, fares and charges, which schedules "shall also state separately all terminal charges . . . all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper, or consignee." That paragraph also provides that "the provisions of this section shall apply to all traffic, transportation and facilities defined in this Act."

Sec. 6, par. (3) of the Interstate Commerce Act (see Appendix, *post*, p. 47), prohibits any change in

the rates, fares, and charges except after notice and publication of new or revised tariffs.

Sec. 6, par. (7) of the Interstate Commerce Act (see Appendix, *post*, pp. 47-48), provides that unless otherwise provided by the Act, no carrier "shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act." It is further provided in this paragraph of Sec. 6, that no carrier shall "extend to any shipper or person any *privileges or facilities* in the transportation of passengers or property, *except such as are specified in such tariffs.*"

Section 3 of the Interstate Commerce Act (see Appendix, *post*, p. 45) makes it unlawful for a carrier subject to the Act "to make or give any undue or unreasonable preference or advantage" to any shipper or locality or particular description of traffic, "in any respect whatsoever, or to subject" any particular shipper, locality, or description of traffic "to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 1 of the Elkins Act (see Appendix, *post*, p. 48) makes it unlawful to offer, give, or receive any "concession, or discrimination" in the transportation of property in interstate commerce whereby the property shall by any device whatever be transported at less rate than the tariff rate, "or

whereby any other advantage is given or discrimination is practiced."

This court, in *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, held that the foregoing provisions of the Act for the establishment and maintenance of rates and the foregoing and other prohibitions against preferences and discriminations were intended to afford an effective means against discriminations and preferences, and that there was an indissoluble unity between those provisions. In that case this court, at pp. 439-440, said:

"When the general scope of the Act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discriminations. This follows, because unless the requirement of a uniform standard of rates be complied with it would result that violations of the statute as to preferences and discrimination would inevitably follow."

In *Southern Ry. Co. v. Reid*, 222 U. S. 424, this Court, at p. 438, said:

"The provisions of the Act are directed at the abuses most to be feared, unreasonableness in rates and discriminations, *including in the latter discriminations in service, in the acceptance and delivery of freight, and in facilities furnished.*" (Italics ours.)

And at p. 442 of its opinion in the *Reid Case* this Court further said:

"It was no doubt the adaptation of experience to the exigencies of a practical problem, Congress coming to believe that the most effective way to prevent preferences in charges by carriers was to forbid them to 'engage or participate in the transportation of passengers or property' until they had fixed and proclaimed the rate to be charged therefor—a rate that would be not only for one shipper or shipment, but for all shippers and shipments; not for one time only, but for all times."

We think we have shown that the facilities afforded and the services rendered thereby were undoubtedly "transportation" facilities and services. Petitioners contend, however, that these "transportation" facilities and services were in addition to the facilities and services which were provided for in their tariffs lawfully filed, and in addition to the facilities and services which they were required to render to each and every consignee. This position of the petitioners inevitably defeats their claim of right to recover against respondent, for the obvious reason that if the facilities and services were in addition to those for which provision was made in the lawfully filed tariffs they violated the express provisions of Sec. 6, par. (7) of the Act, which prohibits carriers subject to the Act to participate in transportation until tariffs are filed, or to extend any privileges or facilities "except such as are specified in such tariffs." In such case, the petitioners also clearly violated Section 3 of the Act and Section 1 of

the Elkins Act, by affording the respondent transportation facilities and services which it did not offer to other shippers and consignees similarly situated, thereby giving an undue preference and advantage to respondent and unlawfully discriminating in favor of respondent.

See:

- Davis v. Cornwell*, 264 U. S. 560.
Southern Ry. Co. v. Prescott, (*supra*), 240 U. S. 632.
Cleveland, etc., Ry. Co. v. Dettlebach, (*supra*), 239 U. S. 588.
Atchison, etc., Ry. Co. v. Robinson, 233 U. S. 173.
Mitchell Coal Co. v. Penn. R. R. Co., 230 U. S. 247, 261.
Chicago & Alton R. R. Co. v. Kirby, 225 U. S. 155.
Southern Ry. Co. v. Reid, (*supra*), 222 U. S. 424.
Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., (*supra*), 204 U. S. 426.
Louisville & Nashville R. R. Co. v. Mottley, 219 U. S. 467.
Rhodes v. Iowa, 170 U. S. 412.
Hocking Valley Ry. Co. v. U. S., 210 Fed. 735.
Vandalia R. R. Co. v. U. S., 226 Fed. 713.
Dye v. U. S., 262 Fed. 6.
W. Va. Northern R. R. Co. v. U. S., 134 Fed. 198.
Winn v. American Express Co., 149 Ia. 259.
Cicardi Bros., etc., Co. v. Penn. Co., 201 Mo. App. 609.
Clemons Produce Co. v. Denver, etc., R. Co., 208 Mo. App. 100.
Central of Ga. Ry. Co. v. Patterson, 6 Ala. App. 494.

Underwood v. Hines, Director General (Mo.—no official report), 222 S. W. 1037.

Counsel for petitioners argued in the State court, and no doubt will argue in this court, that there is no law which prohibits a common carrier renting an engine or other equipment if it did not thereby impair its ability to perform its common carrier duties. That argument was advanced in the face of petitioners' admission that during the period here involved they did not have the necessary equipment and personnel to perform their common carrier obligations in the Newport News yards. If, under those circumstances, a common carrier can assign its engines and crews to the performance of the work for a particular shipper or consignee, to the exclusion of other shippers and consignees, we submit the door would be open wide to the grossest preferences and discriminations, and that the wholesome provisions of the laws of the United States and of the States might as well be erased from the statute books. If these petitioners could lawfully assign the engines in question to the performance of the terminal work for a particular shipper to the exclusion of other shippers and consignees, it could, under like conditions, assign its engines, crews, and cars to the performance of the complete transportation service, not only in yard movements, but in line-haul movements, for a particular shipper to the exclusion of other shippers. We confidently submit this court will not sanction such an arrangement, whereby the Interstate Commerce Act and related Acts, as well as the corresponding laws of the several States, might be readily evaded.

III.

The facilities furnished and the services performed being "transportation" facilities and services, the petitioners violated Sec. 1, par. (3), Sec. 2, and Sec. 6, par. (7) of the Interstate Commerce Act, if the facilities and services were not in addition to those provided for in the lawfully filed tariffs.

Sec. 1, par. (3) of the Interstate Commerce Act (See Appendix, *post*, pp. 44-45) provides that all charges for any services rendered in the transportation of property "shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Sec. 2 of the Interstate Commerce Act (See Appendix, *post*, p. 45) provides that if any carrier subject to its provisions shall directly or indirectly, by any device whatsoever, "charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered" in the transportation of property subject to the Act, "than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions," such carrier shall be guilty of unjust discrimination, which is prohibited and declared to be unlawful.

Sec. 6, par. (7) of the Interstate Commerce Act

(See Appendix, *post*, pp. 47-48) makes it unlawful for a carrier to "charge, or demand, or collect or receive a greater or less or different compensation" for the transportation of "property, or for any service in connection therewith," than the rates, fares and charges "specified in the tariff filed and in effect at the time."

The Supreme Court of Appeals of Virginia held that,

"Here the service performed by the railway employees with the railway equipment was the precise service which the company was then under immediate obligation to perform with reasonable promptness under the circumstances and for which it has already been paid." (R., pp. 116-117).

If this Court should be of the same opinion, then it is apparent that the petitioners have charged and demanded, and are seeking in these actions to collect from respondent, sums aggregating \$13,298.93, in addition to the tariff charges, for facilities and services which it was under tariff obligation to afford and perform, and for which it was paid. In this aspect of the case, we think no argument is necessary to demonstrate that such additional charge is unlawful, first, because there was no tariff authority for the charge, and Sec. 6, par. (7) of the Interstate Commerce Act makes it unlawful to charge, demand, collect or receive anything more or less than the tariff rate; second, because it is unjust and unreasonable and is prohibited and declared to be

unlawful by Section 1, paragraph (3) of the Interstate Commerce Act; and, third, because it constitutes an unjust discrimination, which is prohibited and declared to be unlawful by Section 2 of the Interstate Commerce Act.

See:

Louisville & Nashville Railroad Co. v. Maxwell,
237 U. S. 94.

Louisville & Nashville Railroad Co. v. Mottley,
219 U. S. 467.

Chicago, etc., Ry. Co. v. United States, 219 U. S.
486.

*United States v. Union Stock Yard and Transit
Co. of Chicago*, 226 U. S. 286.

United States v. Tozer, 37 Fed. 635.

Lewis, Leonhardt & Co. v. Southern Ry. Co.,
217 Fed. 321.

IV.

THE ALLEGED AGREEMENT WAS VIOLATIVE OF, AND UNLAWFUL AND VOID UNDER, THE STATUTES OF THE STATE OF VIRGINIA.

The engines and crews especially assigned handled intrastate shipments as well as interstate shipments, although the latter vastly predominated. Subsections (2) to (8), inclusive, of Section 1294-c of Pollard's Virginia Code, 1904, contain regulatory and prohibitory provisions applicable to intrastate shipments similar to those of the Federal statutes which apply to the interstate shipments. The Supreme Court of Appeals of Virginia held that the service performed was the precise service which

petitioners were under immediate obligation to perform, and for which they had already been paid, and that therefore the alleged agreement was not supported by legal consideration. This holding applied to both interstate and intrastate shipments. In any aspect of the case, the decision of the Virginia Court, we submit, is conclusive *quoad* the intrastate shipments and is not subject to review by this Honorable Court. However, our remarks with reference to the violations of Federal statutes apply under the statutes of Virginia, so far as the intrastate shipments are concerned.

V.

THE ALLEGED AGREEMENT, BEING VIOLATIVE OF THE INTERSTATE COMMERCE ACT AND THE ELKINS ACT, AND THE CORRESPONDING PROVISIONS OF THE STATUTES OF THE STATE OF VIRGINIA, IS VOID AND NO ACTION CAN BE MAINTAINED THEREON.

It is settled, of course, that an agreement which violates the statutory provisions in question is utterly void, and that neither party thereto can maintain an action thereon. This is conclusively established by the decisions cited in the foregoing pages of this brief. See, also:

Cleveland, etc., Ry. Co. v. Hirsch, 204 Fed. 849, 853-854

Central R. R. Company of N. J. v. U. S. Pipe Line Co., 290 Fed. 983, 987.

Lewis, Leonhardt & Co. v. Southern Ry. Co., 217 Fed. 321, 328.

The case of *Cleveland, etc. Ry. Co. v. Hirsch*, (*supra*), 204 Fed. 849, which involved violation of the Interstate Commerce Act and of the corresponding statutory provisions of the State of Ohio, applied the well-recognized principle that where an indivisible part of the consideration for a contract is tainted with illegality the entire contract is illegal and void. The Circuit Court of Appeals, Sixth Circuit, in its opinion, at pp. 853-854, said:

"It is claimed, however, that, since intrastate traffic is involved under the contract, it is not enough simply to show that the contract is violative of the Interstate Commerce Act. There are two answers to this: In the first place, the settled rule is that the courts regard a contract as illegal where an essential and indivisible part of its consideration is tainted with illegality. *Armstrong v. Toler*, 11 Wheat, 258, 271, 6 L. Ed. 468; *E. E. Taenzer & Co. v. Chicago, R. I. & P. Ry. Co.*, *supra*, 191 Fed. 550, 112 C. C. A. 153; *Widoe v. Webb*, 20 Ohio St. 431, 435, 5 Am. Rep. 664; *McQuade v. Rosecrans*, 36 Ohio St. 442, 448. There is nothing in the present contract to indicate an intent to distinguish between the two classes of commerce, interstate and intrastate; the traffic, as well as the use of the premises, is treated as an entirety."

As the decision of the Virginia Court that the alleged agreement was void is conclusive *quoad* intrastate shipments, and as the alleged consideration for the agreement here involved is indivisible, the entire agreement for this further reason neces-

sarily falls under the principle applied in the *Hirsch* case.

VI.

ARGUMENT ON BEHALF OF PETITIONERS ANSWERED.

POINT I.

"Point I," advanced and argued at p. 9 *et seq.* of the brief for petitioners is that there was no obligation upon the petitioners, under the line-haul tariff rate, to furnish switching and spotting service solely for the convenience of respondent.

We do not contend that petitioners were under any such obligation. One of the questions of fact in the case was the character of service which the engines performed. Petitioners' superintendent, Ford, testified the engines performed partly a spotting service. On the other hand, all of the other witnesses who testified on the point state emphatically that the engines were not used for intra-plant or inter-plant switching service, or for spotting service at the petitioners' convenience, but were used in delivering petitioners' cars on the sidetracks in the camps and at the warehouses which had been provided and designated as the place of delivery. Ford was in charge of the terminal and had manifold duties to perform. He was not in active touch with the engines. The trial court and the Supreme Court of Appeals of Virginia found as a fact that

the engines were not used for intra-plant or inter-plant switching, or for spotting service for the convenience of the shipper, but, on the contrary, that they were used in the performance of the regular terminal service which the petitioners were required to render and should have rendered under the legally filed tariffs. (R., pp. 115, 116-117). The finding of the State Courts concludes that issue of fact, and therefore, we submit, the argument on behalf of petitioners under "Point I," and the authorities relied upon have no application to this case.

POINT II.

"Point II," stated and argued at p. 11 *et seq.* of the brief for petitioners, is that the obligation of a carrier to place or spot cars under the line-haul tariff rate does not contemplate the furnishing of special facilities to a shipper to meet abnormal conditions.

We do not contend the petitioners were under obligation to furnish special facilities or services to a particular shipper or consignee to meet abnormal conditions. We do contend, however, and submit we have shown, that the facilities and services afforded by these petitioners were "transportation" facilities and services, that if they were in addition to those provided for in the lawfully filed tariffs the petitioners violated Sections 3 and 6 of the Interstate Commerce Act and Section 1 of the Elkins Act, and that if they were not in addition to the facilities and services provided for in the lawfully

filed tariffs the petitioners violated Sec. 1, par. (3), Sec. 2, and Sec. 6, par. (7), of the Interstate Commerce Act, and that, therefore, in either aspect the alleged agreement is tainted with illegality and is wholly null and void.

Nor do we contend that the petitioners would have been liable in damages to respondent for its failure to make delivery when such failure resulted from sudden and great demands which it had no reason to anticipate, or that the respondent would be entitled to recover from petitioners for any service which it may have rendered in the transportation. Therefore, the quotations at pp. 12 to 14 of petitioners' brief from the cases of *Pennsylvania R. R. Co. v. Puritan Coal Co.*, 237 U. S. 221, and *Waste Merchants Association v. Director General*, 57 I. C. C. 686, have no application to these cases. We submit the fact that a carrier is not liable in damages for failure to render service under sudden and unanticipated demands, or that a shipper may not be entitled to an allowance for a service rendered in connection with the transportation, can have no bearing upon a case in which a carrier seeks to recover on an alleged agreement of this character.

POINT III.

"Point III," stated and argued at p. 16 *et seq.* of the brief for petitioners, is that the contract for the rental of the engines did not constitute an undue preference or an illegal, expedited service.

1. We think we have shown that these cases involve the assignment of the engines and crews to the performance of the "transportation" service of delivering respondent's cars, and that in any aspect of the case the petitioners violated the statutes of the United States and of the State of Virginia.

The authorities cited and relied upon at pp. 17 and 18 of petitioners' brief were decided on the long-settled principle that a railroad company does not act as a common carrier in hauling circus trains and the like, that the law of common carriers does not apply in such cases, and that therefore a railroad, in contracting under such circumstances acts in its individual and not in its common carrier capacity. The principle has been applied in numerous cases, and we need not prolong this brief by discussing in detail the cases cited in petitioners' brief. We think it is obvious the principle applied in those cases has no application to these cases, and the Virginia court so held. (R., p. 116).

2. At p. 18 of the brief for petitioners, it is stated that if the question of preference or expedited service is involved in these cases "it is believed the failure to exact payment for the engine and crew will constitute a preference, since respondent is thereby given a preference over other shippers during the term of this contract" and the cases of *Chicago & Alton R. R. Co. v. Kirby*, 225 U. S. 155, and *Davis v. Cornwell*, 264 U. S. 560, are cited in support of that expression of belief.

In the *Kirby Case*, the shipper sued for damages alleged to have resulted from failure to give expedited service to a carload shipment of high grade horses. This Court held the special contract was invalid under the Interstate Commerce Act, and denied recovery. In the *Cornwell Case*, the shipper sued on an alleged contract whereby it was claimed the carrier agreed to furnish empty cars on a certain day for shipment of cattle. This Court held that furnishing cars was a part of the transportation within the Interstate Commerce Act, and a common carrier service, that a contract to furnish cars on a certain day imposed a greater obligation than that implied in the tariff, and that the contract was therefore void. These cases present the identical situation, except here the carriers are suing instead of a shipper. Petitioners seek to recover on a contract under which they contend a special service not afforded other consignees was rendered. That service was a common carrier transportation service. For the same reasons that the special contracts in the *Kirby* and *Cornwell Cases* were held to be illegal and void, the alleged agreement in this case is illegal and void, and while the respondent may have received the benefit of facilities and services which the petitioners could not legally afford, the agreement is nevertheless tainted with illegality and can afford no basis for recovery by the petitioners.

3. At p. 20 of the brief for petitioners, quotation is made from the Naval Appropriation Act of August 29, 1916, 39 Stat. 604, which amended Section 6

of the Interstate Commerce Act, and which provided that in time of war "preference and precedence shall, *upon demand of the President of the United States*, be given over all other traffic for the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic." Quotation is also made at p. 21 from the President's proclamation assuming control of the railroads, effective at 12:00 o'clock M. on December 28, 1917, except for accounting purposes, and effective at 12:00 o'clock midnight on December 31, 1917, for accounting purposes, in which it was stated such control was taken "to the end that such systems of transportation be utilized for the transportation of troops, war material and equipment, to the exclusion as far as may be necessary of all other traffic thereof."

It is argued from these provisions of the Act of August 29, 1916, and the President's proclamation that petitioners were justified in giving an expedited service in the delivery of this construction material, that obviously the Act of August 29, 1916, did not require a carrier to place its equipment at the disposal of the Government without consideration, and that therefore the petitioners were justified in rendering an expedited service and in charging therefor. This argument has many fallacies.

First. The provision in question of the Act of August 29, 1916, applied only "upon demand of the President of the United States." It is not even

suggested in this record that any demand was made by the President to the Chesapeake & Ohio Railway Company, the petitioner in case No. 170, prior to Federal control. The President's proclamation was dated December 26, 1917, and was not effective in any of its terms until December 28, 1917, and the facilities and services afforded by the Chesapeake & Ohio Railway Company were afforded prior to the effective date of the proclamation. Therefore, in no event does the Act of August 29, 1916, apply to, or in any way affect, case No. 170.

Second. In assuming control of the railroads, the President did not act under authority of Sec. 6 of the Interstate Commerce Act as amended by the Naval Appropriation Act of August 29, 1916, and the President's proclamation was not predicated upon that Act. On the contrary, the President took possession of the railroads under, and the President's proclamation was based upon, the provisions of the Act approved August 29, 1916, entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," (39 Stat. 465). This Act provided:

"The President in time of war is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion, as far as may be necessary, of all other traffic thereon, for the transfer or transportation of troops, war material, and equipment, or for such other

purposes connected with the emergency as may be needful or desirable."

Neither this Act nor the Presidential proclamation of December 26, 1917, suspended the operation of the Interstate Commerce Act or the Elkins Act. In fact, the proclamation specifically provided that:

"Until and except so far as said Director (the Director General of Railroads) shall from time to time otherwise by general or special orders determine, such systems of transportation *shall remain subject to all existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions of the various states in which said systems or any part thereof may be situated.*" (Italics ours).

Sec. 10 of the subsequent Act of Congress of March 21, 1918, c. 25, 40 Stat. 451, commonly known as the Federal Control Act, provided:

"That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President."

Sec. 10 of the Federal Control Act empowered the President to initiate "rates, fares, charges, classifications, regulations, and practices *by filing the same with the Interstate Commerce Commission. . . .*" The Interstate Commerce Commission was pro-

hibited from suspending rates so initiated by the President; pending final determination, but it was provided that the rates so initiated by filing the same with the Interstate Commerce Commission, "shall be reasonable and just," and the Interstate Commerce Commission was given the power, and was directed, upon complaint, to inquire into the justness and reasonableness thereof, and after full hearing to make such findings and orders "as are authorized by the Act to regulate commerce as amended, and said findings and orders shall be enforced as provided in said Act."

It has been expressly held that neither the act of Congress empowering the President to take possession of the railroads nor the Presidential proclamation suspended the operation of the provisions in question of the Interstate Commerce Act, or of the Elkins Act. *United States v. Metropolitan Lumber Co.*, 254 Fed. 335, 349.

It is true the cars of material which were handled by these engines were for use by the respondent in constructing the Government facilities at the Port of Embarkation. At the same time, shipments for the War Department of military material and supplies strictly, as distinguished from contractors' construction materials, were arriving and in the Newport News yards. (R., pp. 71-72.) No officer of the United States had designated respondent's cars as war material entitled to priority. In fact, as we have shown, the General in charge of the port and the Government's Construction Quartermaster,

in conjunction with respondent's Construction Engineer, had conference after conference with petitioners' Superintendent in an endeavor to have petitioners deliver the shipments in question, and it was not the result of a demand, or designation of the shipments as war material, which prompted petitioners to assign these engines, but the result of conferences in which respondent urged petitioners to take action to make deliveries of the material.

If it were conceded, or if this Court should be of opinion, that this material for construction purposes was "war material" within the meaning of those words as they are used in the enabling Act and in the Presidential proclamation, and if it were made to appear in this record, which is not the case, that a proper Government officer had requested or demanded that priority be given to the delivery of the cars containing the material, still no justification would be shown for the attempt to collect this very substantial additional charge in excess of the lawful tariff rates. While a carrier might justify a preference given to "war material" over other traffic, upon a proper showing, it could, we submit, in no event charge more than the tariff rate for the service. It would render no additional service in giving such priority which would entitle it to a higher charge, but would give only priority of movement to one class of freight over another. In no event could it charge, demand, collect, or receive a greater or less or different compensation than that specified in the tariffs.

Third. The contract between petitioners and the United States Government was a cost plus contract, and if the petitioners were to recover the respondent would be entitled to reimbursement from the War Department, plus its commission. There is presented, therefore, the unique situation of the Railroad Administration, an arm of the United States Government, suing the respondent for charges which, we submit, are utterly unlawful, and which if petitioners prevail, will ultimately be paid by the War Department, plus the commission. We submit that neither the Act enabling the President to take over the railroads nor the Presidential proclamation was intended to, or will, operate to bring about this result.

VII.

THE ALLEGED AGREEMENT IS NOT SUPPORTED BY A LEGAL CONSIDERATION.

The services performed by petitioners with the engines were either (1) special services in addition to those provided in the tariff, in which event the agreement violated the Interstate Commerce Act and the Elkins Act, as well as the statutes of the State of Virginia, or (2) they were services which the petitioners were obligated to perform under the line-haul rate and the statutes in question, in which case the services were the identical services which petitioners were under immediate obligation to perform, as was held by the Supreme Court of Appeals of Virginia. In the latter event, the peti-

tioners did no more than they were under immediate obligation to do, and it necessarily follows in such case that the alleged agreement was without legal consideration. The absence of a legal consideration to support an undertaking renders the undertaking void and unenforceable, and no recovery can be had thereon upon familiar principles, a discussion of which we need not undertake.

CONCLUSION.

We submit we have shown the petitioners are not entitled to recover in any aspect of these cases, and for the reasons hereinbefore stated and discussed it is urged that the judgment of the Supreme Court of Appeals of Virginia should be affirmed.

Respectfully submitted,

HENRY W. ANDERSON,

THOMAS B. GAY,

WIRT P. MARKS, JR.,

Counsel for Respondent.

APPENDIX.

Sec. 1, par. (2) of Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 379, as amended June 29, 1906, c. 3591, Sec. 1, 34 Stat. 584, and June 18, 1910, c. 309, Sec. 7, 36 Stat. 544, provides in part:

The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

Sec. 1, par. (3) of Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 379, as amended June 29, 1906, c. 3591, Sec. 1, 34 Stat. 584, and June 18, 1910, c. 309, Sec. 7, 36 Stat. 544, provides in part:

All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Sec. 2 of Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 379, provides:

That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination which is hereby prohibited and declared to be unlawful.

Sec. 3 of Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 380, provides in part:

That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person,

company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Sec. 6, par. (1) of Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 380, as amended March 2, 1889, c. 382, Sec. 1, 25 Stat. 855, and June 29, 1906, c. 3591, Sec. 2, 34 Stat. 586, provides:

That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which

in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

Sec. 6, par. (3) of Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 381, as amended March 2, 1889, c. 382, Sec. 1, 25 Stat. 856, and June 29, 1906, c. 3591, Sec. 2, 34 Stat. 586, provides in part:

No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection.

Sec. 6, par. (7) of Interstate Commerce Act,

February 4, 1887, c. 104, 24 Stat. 381, as amended March 2, 1889, c. 382, Sec. 1, 25 Stat. 856, and June 29, 1906, c. 3591, Sec. 2, 34 Stat. 587, provides in part:

No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Sec. 1 of the Elkins Act, February 19, 1903, c. 708, 32 Stat. 847, as amended June 29, 1906, c. 3591, Sec. 2, 34 Stat. 589, provides in part:

* * * and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common car-

rier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced.

Sec. 10 of the Federal Control Act, March 21, 1918, c. 25, 40 Stat. 451, provides in part:

That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President.

* * * * *

That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the Commission pending final determination.

Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any

order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and co-ordinated national control and not in competition.

After full hearing the Commission may make such findings and orders as are authorized by the Act to regulate commerce as amended, and said findings and orders shall be enforced as provided in said Act: *Provided, however*, that when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said finding and certificate by the President, together with such recommendations as he may make.



SUPREME COURT OF THE UNITED STATES.

Nos. 170 and 171.—OCTOBER TERM, 1925.

The Chesapeake & Ohio Railway Com-
pany, Petitioner,

170

vs.

Westinghouse, Church, Kerr & Co., Inc.

Andrew W. Mellon, Director General
of Railroads, Petitioner,

171

vs.

Westinghouse, Church, Kerr & Co., Inc.]

On Writs of Certiorari to
the Supreme Court of
Appeals of the State of
Virginia.

[March 1, 1926.]

Mr. Justice BRANDEIS delivered the opinion of the Court.

These actions were brought in a state court of Virginia to recover amounts alleged to be due for the use of an engine and crew rented or assigned by the Chesapeake & Ohio Railway Company to Westinghouse, Church, Kerr & Co., Inc., under a contract made in September, 1917. The latter corporation was engaged in construction work for the Government on premises at Newport News connected by industrial tracks with the Railway's main line. Owing to war conditions, there was then serious congestion of traffic at Newport News, and the Railway failed duly to perform spotting service for the company. To remedy this condition the engine and crew were assigned to the exclusive use of its traffic, payment to be made therefor as prescribed in the contract. The use continued from that date until April, 1918. The Railway sued for the period prior to December 28, 1917; the Director General for that later. The defences were want of consideration and that the contract was void because it violated the Interstate Commerce Act and a similar law of the State. A judgment for the defendant, entered in each case by the trial court, was affirmed by the Supreme Court of Appeals on the ground of want of consideration. 138 Va. 647. This Court granted writs of certiorari. 266 U. S. 598. No question under the state law is before us.

The service of spotting cars was included in the line haul charge under both interstate and state tariffs. The Railway contends that under the tariffs no obligation rested upon the carrier either to furnish spotting service solely for the convenience of a shipper or to furnish him special facilities to meet abnormal and unprecedented conditions; that the contract was, therefore, not without consideration; and that, being for rental of equipment, it was not for a common carrier service and, hence, a contract therefor was legal under the Interstate Commerce Act, although no tariff provided for the charges. The service by special engine and crew contracted for and given was not spotting solely for the convenience of the shipper. It was the spotting service covered by the tariff. Compare *Car Spotting Charges*, 34 I. C. C. 609; *Downey Shipbuilding Corp. v. Staten Island Rapid Transit Ry. Co.*, 60 I. C. C. 543. It is true that abnormal conditions may relieve a carrier from liability for failure to perform the usual transportation services, but they do not justify an extra charge for performing them. The carrier is here seeking compensation in excess of the tariff rate for having performed a service covered by the tariff. This is expressly prohibited by the Interstate Commerce Act, Act of February 4, 1887, c. 104, § 6(7), 24 Stat. 379, 381, as amended. A contract to pay this additional amount is both without consideration and illegal. It is no answer that by virtue of the contract the shipper secured the assurance of due performance of a transportation service which otherwise might not have been promptly rendered; that ordinarily rental of engine and crew is not a common carrier service; and that such rental may be charged without filing a tariff providing therefor. Compare *Chicago, Rock Island & Pacific Ry. Co. v. Maucher*, 248 U. S. 359. To so assure performance to a shipper was an undue preference. Hence the contract would be equally void for illegality on this ground. *Davis v. Cornwell*, 264 U. S. 560.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.